Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PETE WILSON, et al., *Petitioners*,

v.

JOHN ARMSTRONG, et al., *Respondents*.

STATE OF CALIFORNIA, et al., *Petitioners*,

v.

DERRICK CLARK, et al., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ARMSTRONG; JOHN AMAURIC; RICHARD PONCIANO; JACK SWENSEN; BILLY BECK; JUDY FENDT; WALTER FRATUS; ROY ZATTIERO,

Plaintiffs-Appellees,

UNITED STATES OF AMERICA,

Intervenor,

v.

PETE WILSON; JOSEPH SANDOVAL; JAMES GOMEZ, DIRECTOR, Department of Corrections; KYLE S. McKINSEY; KEVIN CARRUTH; DAVID TRISTAN; MARISELA MONTES, Deputy Director of the Parole and Community Services Division.

Defendants-Appellants.

No. 96-16870

D.C. No. CV-94-02307-CW

OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted
June 9, 1997--San Francisco, California

Filed August 27, 1997

Before: Alfred T. Goodwin, Dorothy W. Nelson, and Stephen S. Trott, Circuit Judges.

Opinion by Judge Goodwin

SUMMARY

Individual Rights/Disabilities

The court of appeals affirmed a judgment of the district court. The court held that state prison inmates can sue correctional officials to enforce their rights under the Americans with Disabilities Act and the Rehabilitation Act.

Appellee John Armstrong and other California prisoners and parolees with disabilities brought a class action under the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA). The parties stipulated that some prison facilities maintained certain procedures and programs that violated the statutes.

The district court denied a defense motion for summary judgment on the ground of Eleventh Amendment sovereign immunity and issued a remedial order and an injunction requiring the defendants to submit detailed plans for complying with the ADA and the RA. The court of appeals denied the defendants' petition under 28 U.S.C. § 1292(b) to bring an interlocutory appeal.

The district court specifically ordered that as a component of the remedial plan, the Department of Corrections was to cluster class members with certain disabilities at designated institutions and parole facilities. The court also directed that the plan address specific substantive concerns of the inmates.

The correctional officials appealed, contending that the ADA and RA do not apply to state prison inmates, and that Eleventh Amendment sovereign immunity barred the action.

The inmates contended that the court of appeals lacked jurisdiction to review the injunction because the previous discretionary denial of permission to appeal under § 1292(b) barred the defendants from raising in any interlocutory appeal their claims regarding the application of the statutes to prisons. The inmates also asserted that the remedial order and the injunction were not appealable as of right under § 1292(a) because the underlying judgment required only the development of plans for complying with the ADA and the Ra, and was therefore non an "injunction." On the Eleventh Amendment issue, the inmates cited *Ex parte Young*, 209 U.S. 123 (1908), which established an exception to state sovereign immunity.

[1] Interlocutory appeals under § 1292(a) are "by right," while those under § 1292(b) are "by permission." A denial of permission to appeal under § 1292(b) does not foreclose appeal under § 1292(a). **[2]** A number of circuits have held that an order requiring submission of a remedial plan is generally not an injunction that is reviewable interlocutorily under § 1292(a)(1). **[3]** These circuits have recognized two exceptions: a normally non-appealable order to submit a plan may be appealable when it sufficiently specifies the content of the plan, and **[4]** an appeal is not premature if delaying it would not clarify the questins on appeal and the specifications of the plan would not alter in a material way the issues that would be presented to the court of appeals.

[5] This appeal met both exceptions. The district court prescribed the contents of the plan with some specificity, and directed that the plan address specific substantive concerns of the inmates. **[6]** The district

court's order made the content and scope of the remeidal scheme sufficiently clear to enable appellate review. [7] The plan the defendants would ultimately submit would not have altered appellae perspective on the signle issue the defendants raised: whether the ADA and the RA apply to state prison inmates. [8] The court of appeals had jurisdiction to entertain the appeal.

[9] Both the ADA and the RA have been applied in the state prison context. [10] Even in light of recognized federalism concerns, the plain language of the ADA and the RA and prior interpretations of it supported application of the statutes to state prisons.

[11] The RA applies broadly to all aspects of state and local governance. Congress intended to apply the RA to *any* program or activity receiving federal financial assistance, including state prisons. [12] The ADA is similarly expansive. Since Congress has directed that the ADA and the RA be construed consistently, the term "program" in the ADA can be read in light of prior cases concerning the RA to encompass prison activities. [13] Nothing in the legislative history of the RA or the ADA reflects an intent by Congress to exclude prisons or prisoners from the reach of the statutes.

[14] Inmates may be considered "qualified individuals" for purposes of the ADA and the Ra. Inmates "qualify" for particular programs and services provided by the prison system in the sense that they must meet certain criteria for participating. The defendants' interpretation would have immunized from the reach of these statutes any compulsory service provided by the state, such as public education or jury service.

[15] Some services and programs that prisons provide can be seen as benefits to the inmates. More significantly, the ADA and the RA do not merely protect disabled individuals from denial of benefits. They also prevent

disabled individuals from being excluded from participation in or subjected to discrimination under any state program or activity, and prohibit discriminaiton by an public entity. Whether the inmates benefit from the programs is irrelevant.

[16] In passing the ADA and the RA, Congress articulated its judgment that discrimination against individuals with disabilities will not be tolerated, and it deliberately drafted the statutes to include language reaching into the state sphere. **[17]** The ADA and the RA apply to inmates and parolees in the state correctional system.

[18] Under *Ex parte Young*, the Eleventh Amendment is no bar to federal jurisdiction over a suit against a state official that seeks only prospective injunctive relief in order to end a continuing violation of federal law. Even when the relief sought may have a substantial ancillary effect on the state treasury, a suit against state officials may proceed so long as the releif serves directly to bring an end to a present violation of federal law.

[19] The defendants did not contest that the suit sought only prospective injunctive relief to end continuing violations of the ADa and the RA. No court has carved out an exception to *Ex parte Young* on the basis of the complexity and scope of the prospective injunctive relief sought. Many have permitted suits to proceed when plaintiffs sought comprehensive relief similar to the refors the plaintiffs sought in this case. There was no bases for creating such an exception.

[20] *Young* is not limited to violations of federal constitutional law; it applies to suits alleging violations of federal statutes. **[21]** Sovereign immunity presented no bar to the suit.

COUNSEL

James M. Humes, Deputy Attorney General, San Francisco, California, for the defendants-appellants.

Eve H. Shapiro, Howard, Rice Nemerovski, Canady, Falk & Rabkin, San Francisco, California; Donald Specter, Prison Law Office, San Quentin, California, for the plaintiffs-appellees.

Seth M. Galanter, United States Department of Justice, Washington, D.C., for intervenor/amicus curiae United States of America.

OPINION

GOODWIN, Circuit Judge:

California state officials appeal an injunction entered in a class action brought by California state prison inmates and parolees with disabilities, who sought relief for violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131-34, and the Rehabilitation Act of 1973 ("RA"), 29 U.S.C. § 794. The district court denied the defendants' motion for summary judgment based on the Eleventh Amendment, found that the defendants had violated both statutes, and entered a remedial order and injunction directing them to develop a plan for compliance with the statutes. The defendants appeal, and we affirm.

I. FACTS AND PROCEDURAL HISTORY

A certified class of all present and future California state prison inmates and parolees with disabilities sued California state officials in their official capacities, seeking

injunctive relief for violations of the RA and the ADA in state prisons. The parties stipulated that some prison facilities lack adequate emergency evacuation plans for prisoners with disabilities, that the range of vocational programs for disabled inmates is more limited than the range provided for non-disabled prisoners, and that some disabled inmates have been improperly classified for work and educational purposes so as to deny them the sentence reduction credits afforded to other inmates.

The defendants do not challenge the content of the injunction or the district court's finding that they violated the statutes. They argue only that the ADA and RA do not apply to state prisons and that the Eleventh Amendment bars this suit in federal court.

II. JURISDICTION

We address first the plaintiffs' contentions that we lack jurisdiction to consider the appeal of the injunction. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("[E]very federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction. . . .") (internal quotations omitted). Although we previously denied the defendants' petition to proceed with the appeal under 28 U.S.C. § 1292(b), which permits immediate appeal of an order if it "involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal . . . may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), the defendants brought the current appeal under 28 U.S.C. § 1292(a)(1). That provision establishes jurisdiction for appeals from "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions." 28 U.S.C. § 1292(a)(1).

[1] The plaintiffs assert that our previous discretionary denial of permission to appeal under 28

U.S.C. § 1292(b) resolved that the defendants may not present in any interlocutory appeal their claims regarding the application of the statutes to prisons. However, interlocutory appeals under § 1292(a) are "by right," while those under § 1292(b) are "by permission." *See Edwards v. Director, Office of Workers' Comp. Progs.*, 932 F.2d 1325, 1328 (9th Cir. 1991). We have held that a denial of permission to appeal underS 1292(b) does not foreclose appeal under § 1292(a), where a litigant can meet the requirements of § 1292(a). *See Transworld Airlines, Inc. v. American Coupon Exch., Inc.*, 913 F.2d 676, 680 (9th Cir. 1990); see also *City of Fort Madison v. Emerald Lady*, 990 F.2d 1086, 1088-90 (8th Cir. 1993) (reaching question of jurisdiction under S 1292(a) after denial of permissive appeal under § 1292(b)); *Cobb v. Lewis*, 488 F.2d 41, 45-46 (5th Cir. 1974) (finding jurisdiction under § 1292(a) after previous denial of permission to appeal under § 1292(b)).

The plaintiffs also argue that the remedial order and injunction are not appealable because the judgment in which they are contained merely requires the defendants to submit detailed plans for complying with the ADA and RA and is thus not an "injunction" within the meaning of § 1292(a)(1). That the district court titled its order an "injunction," and that the parties might have understood it as such, does not end our inquiry. "In determining the appealability of an interlocutory order under 28 U.S.C. § 1292(a)(1), we look to its substantial effect rather than its terminology." *Tagupa v. East-West Ctr., Inc.*, 642 F.2d 1127, 1129 (9th Cir. 1981) (internal quotations omitted). We thus must decide whether the district court's order has the substantial effect of an injunction.

[2] Although we have never ruled on this question, a number of other circuits have held that an order requiring submission of a remedial plan is generally not an injunction that is reviewable interlocutorily under § 1292(a)(1). *See*, e.g., *Sherpell v. Humnoke Sch. Dist. No. 5*,

814 F.2d 538, 539-540 (8th Cir. 1987) (order to develop plans to end race discrimination in schools); *Groseclose v. Dutton*, 788 F.2d 356, 359-61 (6th Cir. 1986) (order to submit plans to remedy unconstitutional conditions on death row); *Spates v. Manson*, 619 F.2d 204, 209-11 (2d Cir. 1980) (order to submit plan to improve prison legal resources); *Hoots v. Pennsylvania*, 587 F.2d 1340, 1348-51 (3d. Cir. 1978) (order to submit plan to desegregate schools). Such a rule is "consonant with the federal policy against piecemeal appeals" and "enable[s] the appellate tribunal to examine the case in the context of a specific remedial regime instead of in a mere abstract posture." *Frederick L. v. Thomas*, 557 F.2d 373, 379-80 (3d Cir. 1977).

[3] Our sister circuits have recognized two exceptions to the rule that orders requiring merely the development of a remedial scheme are not appealable injunctions under § 1292(a)(1). The Second, Third, Fourth, and Eleventh Circuits have held that a normally non-appealable order to submit a plan may be appealable when the order sufficiently specifies the content of the plan to be submitted. *See Groseclose*, 788 F.2d at 360; *Spates*, 619 F.2d at 209; *Hoots*, 587 F.2d at 1349 ("controlling factor [is] whether the order specifie[s] the nature, requirements and extent of the relief to be afforded by the plan to be submitted"); see also *United States v. Alabama*, 828 F.2d 1532, 1536-38 (11th Cir. 1987) (determining appealability under § 1291). An appellate court will lack jurisdiction under § 1292(a)(1) "when important issues regarding the nature and extent of the relief . . . still remain to be resolved and are dependent on the particular circumstances of the case as it would develop in the proceedings subsequent to the entry of the order." *Groseclose*, 788 F.2d at 360.

[4] The Third Circuit has held that where delaying the appeal would not "clarify the questions on appeal " and where the exact specifications of the plan would not

"alter in a material manner the issues that would be presented to the court of appeals," an appeal of an order mandating the development of a plan may proceed under § 1292(a)(1). *Frederick L.*, 557 F.2d at 380. Under this view, an appeal is not premature if the plan ultimately submitted will not change the "appellate perspective." *Id.* at 381.

[5] This appeal meets both of these exceptions. First, the district court prescribed the contents of the plan with some specificity. It ordered that "as a component of the [plan], the [Department of Corrections] will cluster class members with certain disabilities at designated institutions and parole facilities." *Armstrong v. Wilson*, No. C-94-2307-CW, at 2-3 (N.D. Cal. Sept. 20, 1996). The court further directed that the plan address specific substantive concerns of the disabled inmates such as disability grievance procedures, reception center processing times, accommodations for emergency situations, assistive aids, accessibility of new construction, criteria for medical disabilities, and school and job assignments for disabled prisoners. *See id.*

[6] Although the precise contours of the final plan may be unknown, we conclude that the district court's order makes the content and scope of the remedial scheme sufficiently clear to enable appellate review. *See Frederick L.*, 557 F.2d at 381 ("The precise ingredients of the plan . . . will have no . . . metamorphosizing effect on our understanding of this case.").

[7] Second, the specific plan the defendants ultimately submit will in no way alter our "appellate perspective" on the single issue the defendants raise in this appeal of the remedial order: whether the ADA and RA apply to state prison inmates. *See id.* We can answer this purely legal question whether or not a detailed remedial scheme has been formulated.

[8] In light of the content of the district court's order and the scope of the defendants' appeal, we conclude that we have jurisdiction under 28 U.S.C. § 1292(a)(1) to entertain this appeal and thus proceed to discuss the merits of the defendants' claim that the ADA and RA do not apply to state prison inmates.

III. APPLICATION OF THE STATUTES TO STATE PRISONS

[9] We have previously applied both the ADA and RA in the state prison context. In *Duffy v. Riveland*, 98 F.3d 447, 453-56 (9th Cir. 1996), we held that a prison inmate may state a claim under both the RA and the ADA that he was improperly excluded from participation in, and denied the benefits of, a prison service, program, or activity on the basis of his physical handicap. In *Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir. 1988), we held that the RA applies to state prisons on the basis of the statute's plain language and the Justice Department's implementing guidelines.[1]

[10] The defendants urge us to depart from these prior precedents because the correctional officials in those cases failed to raise the issues of federalism and comity that the defendants present here. We decline to institute en banc traffic to retreat from our previous position. Even in light of recognized federalism concerns, we conclude that the plain language of the ADA and RA, and our prior interpretations of that language, support application of the statutes to state prisons. We thus join the Third and Seventh Circuits, each of which recently have held that both statutes apply to state correctional facilities. *See Yeskey v. Pennsylvania Dep't of Corrections*, _____ F.3d

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1. The application of the RA to state prisons was also implicated in *Gates v. Rowland*, 39 F.3d 1439, 1445 (9th Cir. 1994). Because the parties in that case stipulated that the statute applied, however, we had no occasion to reach the question.

_____, No. 96-7292, 1997 WL 378975 (3d Cir. July 10, 1997); *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481 (7th Cir. 1997).

[11] The Rehabilitation Act provides, in pertinent part, that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The statute further defines "[p]rogram or activity" to include "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government." 29 U.S.C. § 794(b). This language suggests that the act applies broadly to all aspects of state and local governance. Moreover, we have interpreted this precise language as evincing Congress's intent to apply the RA to "any program or activity receiving Federal financial assistance," including state prisons. *See Bonner*, 857 F.2d at 562 (internal quotations omitted). We also held in Bonner that prison disciplinary hearings are "programs" with the meaning of the RA. *See id.* at 563; *Duffy*, 98 F.3d at 455.

[12] The plain language of Title VII of the ADA is similarly expansive. It provides, in pertinent part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The act defines "public entity" as "any State or local government [and] any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1). This language encompasses all facets of state government including prison administration. We agree with the Seventh Circuit's conclusion that although "[i]ncarceration itself is hardly a 'program' or

'activity' to which a disabled person might wish access, . . . there is no doubt that an educational program is a program, and when it is provided by and in a state prison it is a program of a public entity." *Crawford*, 115 F.3d at 483 (internal citation omitted). In addition, since Congress has directed that the ADA and RA be construed consistently, see 42 U.S.C. § 12134(b), the term "program " in the ADA can also be read, in light of our prior cases concerning the RA, to encompass prison activities. *See* also *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 n.3 (9th Cir. 1995) (cases involving the RA are "instructive" for claims under the ADA); cert. denied, 116 S. Ct. 711 (1996).

[13] Nothing in the legislative history of the RA or ADA reflects an intent by Congress to exclude prisons or prisoners from the reach of the statutes. When it modeled the ADA on the RA, Congress was presumably aware of numerous court decisions, including Bonner, that had held that the RA applies
to prisons.

> Nevertheless, Congress did not attempt, by altering the language that it was borrowing from the old statute as the template for the new one, to prevent the new one from being interpreted the same way the old one had been interpreted; nor did it amend the [RA] to extinguish the old interpretation.

Crawford, 115 F.3d at 484.

[14] Relying on Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996), in which the Fourth Circuit held that prison officials were entitled to qualified immunity because it was not "clearly established" at the time of the alleged discrimination that the ADA and the RA applied to prisons, the defendants contend that the texts of the statutes do not naturally

apply to the prison context. First, they assert that a prisoner cannot be a "qualified" individual under the acts because most prison services and programs are compulsory. *See id.* at 1347 ("The terms'eligible' and 'participate' imply voluntariness on the part of an applicant who seeks a benefit from the state; they do not bring to mind prisoners who are being held against their will."). We have previously held, however, that inmates may be considered "qualified individuals" for purposes of these acts. *See Duffy*, 98 F.3d at 454; *Bonner*, 857 F.2d at 563. Moreover, inmates do "qualify" for particular programs and services provided by the prison system in the sense that they must meet certain eligibility criteria for participation. For example, to qualify for mental health treatment, inmates must be mentally ill, not pose a threat to themselves or others, and not have a history of violence. The defendants' interpretation would immunize from the reach of these statutes any compulsory service provided by the state, such as public education or jury service.

[15] The defendants also argue that because prisons serve the state's penological interests, the "services, programs, and activities" they provide are not "benefits " within the meaning of these statutes or as that term is ordinarily understood. *See Torcasio*, 57 F.3d at 1347. Some services and programs that prisons provide, such as educational and vocational training and medical attention, can be seen as benefits to the inmates, however. More significantly, the ADA and the RA do not merely protect disabled individuals from denial of benefits. They also prevent disabled individuals from being "excluded from participation in" or "subjected to discrimination under" any state program or activity and they prohibit "discrimination by" any public entity. *See* 29 U.S.C. 794(a); 42 U.S.C. § 12132. Thus, whether the inmates "benefit" from prison programs is irrelevant to the issue of whether state prisons may exclude disabled inmates from programs they provide

to others or discriminate against disabled inmates in the various aspects of prison life.

The defendants urge us to apply the plain statement rule, which holds that where Congress intends to alter the federal state balance, or invade an essential state function, it must do so in unmistakable terms. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). In *Gregory*, the Court refused to apply the Age Discrimination in Employment Act (ADEA) to state judges in the absence of an expression of clear congressional intent because it found that "it is at least ambiguous whether Congress intended that appointed judges . . . be included." *Id.* at 470. In contrast to the ADEA, which expressly excludes most high-ranking public officials from its reach, *see* 29 U.S.C. § 630(f), the ADA and RA apply to "any" and "all" state entities and operations without exclusions. We agree with the Seventh Circuit's statement that Congress could hardly have spoken "much more clearly than it did when it made the [ADA] expressly applicable to all public entities and defined the term 'public entity' to include every possible agency of state or local government." *Crawford*, 115 F.3d at 485; *see* also *Yeskey*, _____ F.3d _____, 1997 WL 378975, at *5.

[16] Although the defendants' federalism arguments have some force in the context of prisons, which traditionally are areas of state concern, we have held that other functions traditionally reserved to the states are subject to the ADA and RA. For example, in *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996), we held that the ADA applies to a quarantine law enacted by the state to protect public health under its police powers. Although "mindful of the general principle that courts will not second-guess the public health and safety decisions of state legislatures acting within their traditional police powers," we concluded that "when Congress has passed antidiscrimination laws such as the ADA . . . , it is incumbent upon the courts to ensure that the mandate of

federal law is achieved." *Id.* In passing the ADA and RA, Congress has articulated its judgment that discrimination against individuals with disabilities will not be tolerated and it deliberately drafted the statutes to include language reaching into the state sphere. That prison administration may be a core state function does not give us license to disregard clear congressional intent. *See Yeskey*, _____ F.3d_____, 1997 WL 378975, at *5.

While the Tenth Circuit has refused to apply the ADA and the RA to prison employment, *see White v. Colorado*, 82 F.3d 364, 367 (10th Cir. 1996), and we have declined to apply the Fair Labor Standards Act to most prison jobs, *see Hale v. Arizona*, 993 F.2d 1387, 1392-98 (9th Cir. 1993), the plaintiffs in this case seek a qualitatively different form of relief than the prisoners in those cases sought. These plaintiffs seek basic access to facilities, inclusion in safety plans, and nondiscriminatory treatment in residential placements and prison programs. "Rights against discrimination are among the few rights that prisoners do not park at the prison gates." *Crawford*, 115 F.3d at 486 (citing *Turner v. Safley*, 482 U.S. 78, 84 (1987)). In enacting the RA and ADA, Congress intended to eliminate discrimination against individuals with disabilities, just as it had earlier passed legislation mandating equal treatment of African-Americans. "If a prison may not exclude blacks from the prison dining hall and force them to eat in their cells, and if Congress thinks that discriminating against a blind person is like discriminating against a black person," the prison may not exclude the blind person from the dining hall unless allowing him access would unduly burden prison administration. *Id.*

[17] We thus hold, based on the plain meaning of the statutes, that the ADA and RA apply to inmates and parolees in the state correctional system and affirm the district court's application of these statutes in entering the injunction.

IV. ELEVENTH AMENDMENT IMMUNITY

We next address the defendants' contention that sovereign immunity bars this suit in federal court. We hold that the exception to Eleventh Amendment immunity set forth in *Ex parte Young*, 209 U.S. 123 (1908), squarely applies to allow this action against named individuals in their official capacity.[2]

[18] Under the doctrine of Ex parte Young, the Eleventh Amendment is no bar to "federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.'" *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1132 (1996) (quoting *Green v. Mansour* 474 U.S. 64, 68 (1985)). "The Young doctrine rests on the premise that a suit against a state official to enjoin an ongoing violation of federal law is not a suit against the State." *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2047 (1997) (plurality opinion). Even where the relief sought may have a "substantial ancillary effect on the state treasury," a suit against state officials may proceed so long as the relief "serves directly to bring an end to a present violation of federal law." *Papasan v. Allain*, 478 U.S. 265, 278 (1986); *see also Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977).

[19] The defendants do not contest that this suit against state officials seeks only prospective injunctive relief to end continuing violations of the ADA and RA. They nevertheless argue that because the plaintiffs seek wide-ranging, wholesale institutional reforms of California's prison system, the suit is against the state and thus falls outside the bounds of *Ex parte Young*. No court,

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2. For a related case by prisoners against the State of California squarely presenting the Eleventh Amendment defense, see our opinion filed this day in *Clark v. California*, No. 96-16952 (9th Cir. _____ 1997).

however, has carved out an exception to *Ex parte Young* on the basis of the complexity and scope of the prospective injunctive relief sought. To the contrary, many courts have permitted suits to proceed under Young where plaintiffs sought comprehensive relief similar to the reforms the plaintiffs seek here. *See, e.g., Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 307, 309-10 (9th Cir. 1993) (rejecting Eleventh Amendment immunity claim where defendants were required to devise a remedial plan to remove contaminants); *Parents for Quality Educ. with Integration, Inc., v. Indiana*, 977 F.2d 1207, 1209-11 (7th Cir. 1992) (allowing suit seeking widespread educational reforms against state officials), modified on other grounds, 986 F.2d 206 (7th Cir. 1993). We, too, see no basis for creating such an exception.

[20] The defendants also maintain that Ex parte Young is limited to violations of federal constitutional law and does not permit suits to remedy statutory violations. This argument is without merit. We have held squarely that *Young* applies to suits alleging violations of federal statutes. *See Natural Resources Defense Council v. California Dep't of Transp.*, 96 F.3d 420, 422-23 (9th Cir. 1996) (stating that *Young* "applies to violations of federal statutory law" and permitting suit under *Young* for violations of the Clean Water Act); *Almond Hill Sch. v. United States Dep't of Agric.*, 768 F.2d 1030, 1034 (9th Cir. 1985) ("The underlying purpose of *Ex parte Young* seems to require its application to claims against state officials for violations of federal statutes.").

[21] Sovereign immunity presents no bar to this suit against state officials seeking prospective injunctive relief against ongoing violations of the ADA and RA in the state penal system. The district court thus correctly denied the defendants' motion for summary judgment.

V. CONCLUSION

Because we conclude that the ADA and RA apply to inmates and parolees in the state penal system and that this suit may proceed in federal court under the doctrine of *Ex parte Young*, we affirm the judgment of the district court.

AFFIRMED.

John ARMSTRONG, et al., Plaintiffs,

v.

Pete WILSON, et al., Defendants.

No. C 94-2307 CW.

United States District Court,
N.D. California.

Sept. 20, 1996.

State prison inmates who were disabled brought class action suit against state prison officials. Defendants moved for summary judgment. The District Court, Wilken, J., held that: (1) as a matter of first impression, both the ADA and Rehabilitation Act applied to state prisons; (2) ADA and Rehabilitation Act were enacted pursuant to Congress' authority under the Fourteenth Amendment; and (3) defendants were not entitled to Eleventh Amendment immunity.

Motion denied.

Warren E. George, McCutchen Doyle Brown & Enersen LLP, San Francisco, CA, Elaine Feingold, Disability Rights Education & Defense Fund, Inc., Berkeley, CA, Michael W. Bien, Rosen Bien & Asaro, San Francisco, CA, Donald Specter, Prison Law Office, San Quentin, CA, for plaintiffs.

Roy Zattiero, pro se.

Morris Lenk, CA State Atty. General's Office, George D. Prince, Deputy Atty. General, CA State Atty. General's Office, San Francisco, CA, for defendants.

Mary Beth Uitti, U.S. Attorney's Office, San Francisco, CA, Sharon N. Perley, U.S.D.J.--Disability Rights Section, Civil Rights Division, Washington, DC, for United States of America, Amicus Curiae.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

WILKEN, District Judge.

Plaintiffs, a certified class consisting of all present and future California state prison inmates and parolees with mobility[1], sight, hearing, learning or kidney disabilities, have moved for injunctive relief under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131--34, and Section 504 of the Rehabilitation Act of 1973 ("the Rehabilitation Act" or "Section 504"), 29 U.S.C. § 794. Defendants, various California state officials being sued in their official capacities, have moved for summary judgment pursuant to the Stipulation and Order for Procedures to Determine Liability and Remedy entered on July 9, 1996 (the "Stipulation"). The United States Department of Justice ("DOJ") has submitted an amicus brief in support of Plaintiffs' opposition. The matter was heard on July 19, 1996. Having considered all of the papers filed by the parties and oral argument on the motion, the Court denies the motion.

FACTS

Defendants move to strike Plaintiffs' separate statement of undisputed facts. The Court grants the motion on the grounds that the parties have stipulated that this summary judgment motion is to be decided solely on the facts included in the parties' joint Statement of Stipulated Facts.

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1. Prisoners with mobility impairments who are housed at the Correctional Medical Facility at Vacaville are excluded from the class.

The following is a brief summary of the facts as provided in the Statement of Stipulated Facts. The California Department of Corrections ("CDC") operates over 31 prisons housing in excess of 130,000 inmates. Some of these facilities receive federal financial assistance. The CDC has conducted surveys to identify certain inmates with disabilities. These surveys have found that: (1) 345 inmates use wheelchairs due to permanent disabilities; (2) 650 inmates have permanent lower extremity impairments which may require the use of an assistive device such as a walker, cane or prosthesis; (3) 141 inmates are deaf or have hearing impairments such that, even with a hearing aid, they are not able to hear effectively or to hear emergency warnings; (4) 219 inmates are blind or have vision that cannot be corrected to 20/100 with corrective lenses. HIV-positive inmates are placed in various units in facilities throughout the system. Inmates with mental health problems are clustered and frequently separated from other inmate populations.

The CDC initiated a self-evaluation in 1995 pursuant to the requirements of the ADA, but has not completed it. In April, 1995, the CDC established and implemented a new administrative grievance procedure which inmates and parolees with disabilities may use to submit grievances or requests for accommodations on matters related to their disabilities. There remain significant problems in implementing this procedure.

The CDC's written policies and procedures for emergencies do not specifically address the evacuation of prisoners with disabilities. Some CDC facilities do not have visual alarms or strobe lights to warn prisoners with hearing impairments of emergencies. When emergency situations arise in prison areas other than living units, some inmates with disabilities may not be aware of, or be able to respond to, emergency warnings of impending danger.

Most inmates who participate in educational classes, vocational training, or have work assignments, including those with disabilities, earn 1/2 time sentence credits to reduce their time in custody. Health care providers classify inmates as "totally medically disabled," "medically unassigned," or "light restricted duty." A "totally medically disabled" classification allows the inmate to earn 1/2 time sentence credits without being required to participate in a program, while a "medically unassigned" classification allows the inmate to earn 1/3 time sentence credits. A "light restricted duty" classification allows the inmate to participate in programs in accordance with a specified restriction due to a physical or mental condition. Some inmates with severe disabilities have been inappropriately classified as medically unassigned rather than totally medically disabled and only earn 1/3 instead of 1/2 time credits against their sentences. Inmates designated as "light restricted duty" may be assigned to jobs that are inappropriate for their limitations. The range of vocational programs available to inmates with disabilities is more limited than that available to other inmates.

LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1288-89 (9th Cir.1987). For the purposes of this motion, the parties have stipulated that there are no material facts in dispute. The Court, therefore, must decide whether the moving party is entitled to summary judgment as a matter of law.

DISCUSSION

Defendants argue that the protections of the ADA and the Rehabilitation Act do not extend to inmates or parolees of state correctional facilities and that Defendants are immune from liability under the Eleventh Amendment of the United States Constitution. While the Ninth Circuit has held that the Rehabilitation Act applies to state prisons, it has not yet considered whether the ADA is applicable to state correctional facilities.[2] Nor has the Ninth Circuit ruled on whether state prison officials have immunity under the Eleventh Amendment for violations of the ADA and the Rehabilitation Act. These, then, are issues of first impression in this Circuit.

I.
APPLICABILITY OF THE ADA AND THE REHABILITATION ACT TO STATE CORRECTIONAL FACILITIES

The Court will not address Defendants' argument that prisoners and parolees are adequately protected under the First, Eighth, and Fourteenth Amendments of the United States Constitution and, therefore, the protections provided under the Rehabilitation Act and the ADA are unnecessary. One need only look to the undisputed stipulated facts of this case to find that this argument is erroneous. Furthermore, it is not the proper role of the judiciary to preempt Congress' decision that there is a need for such legislation.

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2. Only one district court in the Ninth Circuit has squarely addressed the issue of whether the ADA applies to prisons. *Bullock v. Gomez*, 929 F.Supp. 1299 (C.D.Cal.1996) held that the ADA does apply to prisons. In *Fowler v. Gomez*, 1995 WL 779128, *2 (N.D.Cal.1995), a qualified immunity case, a judge of this Court found that there was no authority to "clearly establish" that the ADA applied to state prisons at the time of the alleged incident in question.

A. Ninth Circuit Case Law

1. Rehabilitation Act

Although the Ninth Circuit has held, in *Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir.1988), that the Rehabilitation Act applies to state prison facilities, Defendants argue that this Court should arrive at a different result. Defendants argue that, since Bonner was decided, the Supreme Court has clarified the proper analysis to be used by a district court to determine the applicability of federal statutes to state prisons. Defendants contend that utilization of this analysis will lead to the conclusion that neither the Rehabilitation Act nor the ADA are applicable to state prisons. The Court does not agree.

Section 504 of the Rehabilitation Act of 1973 states, in pertinent part:

> No otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

29 U.S.C. § 794.

In *Bonner*, the Ninth Circuit based its holding primarily on the plain language of the Act, which states that it "applies to 'any program or activity receiving Federal financial assistance' ", and on the Justice Department's implementing regulations which require compliance by correctional facilities under 28 C.F.R. § 42.503(f). *Bonner*, 857 F.2d at 562. The court noted that "[t]he Supreme Court has repeatedly emphasized that federal regulations are 'an important source of guidance

on the meaning of § 504.'" *Id.* (citing *School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987) (parenthetical omitted) and *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 & nn. 14-16, 104 S.Ct. 1248, 1254 & nn. 14- 16, 79 L.Ed.2d 568 (1984)).

The Ninth Circuit rejected the defendants' argument that, because the purpose of the Rehabilitation Act is to foster vocational rehabilitation and independent living, it is not applicable to prison inmates who "are hardly in need of help to live independently within their prisons." *Id.* Instead, the court viewed the goals of independent living and vocational rehabilitation as mirroring the goals of prison officials who "attempt to rehabilitate prisoners and prepare them to lead productive lives once their sentences are complete." *Id.*

In *Gates v. Rowland*, 39 F.3d 1439 (9th Cir.1994), the Ninth Circuit elaborated on its holding in *Bonner*. First, the court, citing Bonner, reaffirmed that "the Act is applicable to prisons receiving federal financial assistance." *Gates*, 39 F.3d at 1446. The court noted, however, that the Rehabilitation Act was intended for use within the general population, and was not specifically tailored to deal with the prison environment. *Id.* The court reasoned that, "just as constitutional rights of prisoners must be considered in light of the reasonable requirements of effective prison administration, so must statutory rights applicable to the nation's general population be considered in the light of effective prison administration." *Id.* The court held that the standard explicated by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) for reviewing constitutional rights in a prison setting should also be used when reviewing the rights provided by the Rehabilitation Act in a prison setting. *Id.* at 1447. In *Turner*, the Supreme Court articulated the rule that, "'when a prison regulation impinges on inmates' constitutional rights, the regulation

is valid if it is reasonably related to legitimate penological interests'". *Id.* (quoting *Turner*, 482 U.S. at 89, 107 S.Ct. at 2261).

Other courts, and Defendants, have interpreted *Gates* to mean that the Ninth Circuit is retreating from its holding in *Bonner*. *See e.g. Torcasio v. Murray*, 57 F.3d 1340, 1349 n. 7 (4th Cir.1995), *cert. denied by Torcasio v. Angelone*, --- U.S. ----, 116 S.Ct. 772, 133 L.Ed.2d 724 (1996) and *Little v. Lycoming County*, 912 F.Supp. 809, 819 (M.D.Pa.1996). The Court disagrees. *Gates* is a reaffirmation and clarification of Bonner, not a retreat from it.

Defendants argue that subsequent to *Bonner*, the Supreme Court, in *Gregory v. Ashcroft*, 501 U.S. 452, 460-61, 111 S.Ct. 2395, 2400-01, 115 L.Ed.2d 410 (1991), clarified the proper analysis for determining whether a federal enactment is applicable to state prisons. They contend that, in *Gregory*, the Court stated a new rule that requires that Congress make its intention unmistakably clear in the language of the statute if it intends to alter the usual constitutional balance between the States and the federal government in traditionally sensitive areas. Defendants conclude that, had the Ninth Circuit applied this "new" plain statement rule in Bonner, it would have held differently.

The Court disagrees. The plain statement rule was not originally articulated in *Gregory*. Although *Gregory* recites this rule, it cites prior cases as authority. One of the cases cited in *Gregory* is *United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971) in which the Court stated that, "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue the critical matters involved in the judicial decision." *Gregory*, 501 U.S. at 461, 111 S.Ct. at 2401 (citing *Bass*, 404 U.S. at

349, 92 S.Ct. at 523). *Gregory* also cites *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947) for the proposition that, "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Gregory*, 501 U.S. at 461, 111 S.Ct. at 2401. Even *Seminole Tribe of Florida v. Florida*, --- U.S. ----, ----, 116 S.Ct. 1114, 1185, 134 L.Ed.2d 252 (1996), the case Defendants use to support their proposition that Gregory adopted a new rule, cites Bass as well as Gregory. It is clear that the "new" rule Defendants proffer has been part of our jurisprudence for many decades. It is patently unreasonable to assume that the Ninth Circuit did not take this rule into consideration in deciding *Bonner*. Although not explicitly stating that it was applying the plain statement rule, in *Bonner* the Ninth Circuit did look for Congressional intent to apply the Rehabilitation Act to state prisons and found such intent in the plain language of the statute and the DOJ's implementing regulations. *Bonner*, 857 F.2d at 562.

Defendants point to two post-*Gregory* Ninth Circuit cases to illustrate that, had the Ninth Circuit used the plain statement rule in *Bonner*, it would not have held the Act applicable to state prisons. In *Hale v. Arizona*, 993 F.2d 1387, 1393, 1395 (9th Cir.1993) (en banc), *cert. denied*, 510 U.S. 946, 114 S.Ct. 386, 126 L.Ed.2d 335 (1993), the Ninth Circuit declined to extend the protections of the Federal Labor Standards Act to inmates required by state law to work at hard labor, but determined that the Act may be applicable to inmates in other employment situations. In *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir.1994), the Ninth Circuit held that Title IX, which prohibits discrimination on the basis of sex by any educational program receiving federal funding, applies to state prisons. *Id.* at 1225. In Hale and Jeldness the Ninth Circuit focused on a list of statutorily exempt programs which did not include prisons and determined that noninclusion in an exempt list creates a strong

implication of inclusion. *Hale*, 993 F.2d at 1392; *Jeldness*, 30 F.3d at 1225.

Defendants contend that the analyses in *Hale* and *Jeldness* rejected the basis for the Ninth Circuit's conclusion in *Bonner*, because, in *Bonner*, the court merely based its holding on the expansive language of the Rehabilitation Act. However, the *Bonner* court also based its holding upon the DOJ's implementing regulations that specifically bring state prisons within the ambit of the Act. *Bonner*, 857 F.2d at 562.

Congress delegated to the head of each agency the authority to promulgate regulations under the Rehabilitation Act. 29 U.S.C. § 794(a). The DOJ regulations define the term "program" as including the "operations of a department of corrections," and the term "benefit" as including "sentencing, confinement, or other prescription of conduct." 28 C.F.R. §§ 42.540(h) and (j). In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984) the Court held that, where Congress has left a gap for the agency to fill, the agency's regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." This Court can find nothing that is arbitrary or capricious in the DOJ's regulations. The broad language of the statute which indicates it reaches "any program or activity receiving Federal financial assistance" imparts to federal agencies, which includes the DOJ, the task of defining the term, "any program". The inclusion of state departments of corrections is a permissible construction of the term, "any program", and, under Chevron, this construction must be given deference.

The Court also finds persuasive the Third Circuit's reasoning in *Inmates of the Allegheny County Jail v. Wecht*, 1996 WL 474106, *10 (3rd Cir.) regarding the applicability of the plain statement rule to decide whether the

Rehabilitation Act and the ADA applies to correctional facilities. In *Inmates*, the Third Circuit found that the language of the Rehabilitation Act and of the ADA clearly indicates that they cover all aspects of state and local governance. *Id.* at *6 (citing, as to the Rehabilitation Act, 29 U.S.C. § 794(a) which states that the Act applies to "any program or activity receiving Federal financial assistance" and 29 U.S.C. § 794(b)(1)(A) which defines "program or activity" to be "all of the operations of a department, agency, special purpose district, or other instrumentality of a State or local government" and as to the ADA, 42 U.S.C. § 12132 which states that it applies to all public entities and 42 U.S.C. § 12131(1) which defines a "public entity" as "any State or local government [and] any department, agency, special purpose district, or other instrumentality of a State or States or local government.") Based on the clear language of the statutes the court held that both the Rehabilitation Act and the ADA apply to state and local correctional facilities. Id. The court determined that the plain statement rule was inapplicable to its analysis since this rule was not "intended by the Supreme Court to provide a canon of statutory interpretation which can be of help in interpreting statutes whose over-all design indisputably contemplates both that the policies and practices of state as well as local governments are required to conform to norms established by Congress . . ." *Id.* at *9.

The Court rejects Defendants' argument that Bonner may apply in Arizona, the state in which the case originated, but not in California. Defendants' rationale is that in Arizona the goal of incarceration is rehabilitation, while in California the goal of incarceration is punishment. Plaintiffs cite many statutes in the California Penal Code and Regulations that indicate that, while the goal of incarceration itself may be punishment, the goal of many prison programs and activities is rehabilitation and reintegration of convicted felons into society.

[1] The Court concludes that the Ninth Circuit's analysis in Bonner is as correct today as it was in 1988 when the Ninth Circuit reached its decision. The Court holds that the Rehabilitation Act applies to prisons.

2. The ADA

In language almost identical to the Rehabilitation Act, the ADA provides, in relevant part:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

42 U.S.C. § 12132.

Defendants contend that utilization of the plain statement rule will lead to the conclusion that the ADA does not apply to state prisons. The Court does not agree.

[2] The Ninth Circuit has indicated that the ADA is to be judicially interpreted in the same manner as the Rehabilitation Act. *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 n. 3 (9th Cir.1995), *cert. denied*, --- U.S. ----, 116 S.Ct. 711, 133 L.Ed.2d 666 (1996). This determination is based on the substantially identical language in the two Acts and the legislative history of the ADA which indicates that Congress intended judicial interpretation of the Rehabilitation Act to be incorporated by reference into interpretation of the ADA. Id.

[3,4] Pursuant to Collings, the Court must apply the Ninth Circuit's reasoning in Bonner to decide whether the ADA applies to state correctional facilities and programs. As noted above, the broad language of the Rehabilitation

Act is repeated in the ADA. The ADA expands the reach of the anti-discrimination provisions of the Rehabilitation Act from "any public facility that receives Federal funding" to "any public entity." As it did in the Rehabilitation Act, Congress has specifically delegated authority to the DOJ to promulgate regulations implementing the ADA. 42 U.S.C. § 12134(a). The DOJ's regulations provide that "all programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions" are governed by the ADA. 28 C.F.R. § 35.190(b)(6). The Court finds that the expansive language of the ADA, together with the DOJ's regulations which it promulgated pursuant to a specific Congressional delegation of authority, lead to the conclusion that the ADA is applicable to state correctional institutions. Following the Ninth Circuit's instruction in Gates, the Court also concludes that, like the Rehabilitation Act, the ADA must be applied in a prison environment with consideration of legitimate penological interests. *See Gates*, 39 F.3d at 1447.

B. Case Law in Other Circuits

Defendants argue that this Court should be persuaded by cases in other circuits in which, Defendants contend, the courts have held the Rehabilitation Act or the ADA are inapplicable to prisons.

Three circuits have directly addressed this issue.[3] As discussed above, the Third Circuit has held that the Rehabilitation Act and the ADA apply to state and local correctional institutions. The Tenth Circuit has held that the Rehabilitation Act and the ADA are inapplicable to state prison employment programs. In *Williams v. Meese*, 926 F.2d 994 (10th Cir.1991), the court held that the Rehabilitation Act is not applicable to federal prison employment and vocational programs because the "Federal Bureau of Prisons does not fit the definition of 'programs or activities' governed by [the Rehabilitation Act]." *Williams*, 926 F.2d at 997. Relying upon *Williams*, and without any further explanation, the Tenth Circuit held in *White v. Colorado*, 82 F.3d 364 (10th Cir.1996), that the ADA does not apply to state prison employment situations. *White*, 82 F.3d at 367.

The Fourth Circuit, in *Torcasio v. Murray*, did not actually hold that the Rehabilitation Act and the ADA do not apply to state prisons, but strongly intimated that they do not. *Torcasio*, a qualified immunity case, held that it was not clearly established, at the time of the alleged discrimination, that either the Rehabilitation Act or the ADA applied to state prisons. *Torcasio v. Murray*, 57 F.3d 1340, 1352 (4th Cir.1995), *cert. denied*, --- U.S. ----, 116 S.Ct. 772, 133 L.Ed.2d 724 (1996). The violations were alleged to have occurred in April, 1993 through the spring, 1994. The *Torcasio* court took the Ninth Circuit's 1988 *Bonner* decision into consideration in its discussion. In

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3. As noted by Defendants, the Seventh Circuit, in a recent opinion by Judge Posner, stated that, "It is very far from clear that prisoners should be considered 'qualified individuals' within the meaning of the [ADA]. Could Congress really have intended disabled prisoners to be mainstreamed into an already highly restricted prison society? . . . [T]here are formidable practical objections to burdening prisons with having to comply with the onerous requirements of the [ADA], . . ." *Bryant v. Madigan*, 84 F.3d 246, 248 (7th Cir.1996). This statement was dicta, however. The court proceeded to analyze the plaintiff's claim under the ADA. *Id.* at 249.

analyzing the DOJ regulations, however, the *Torcasio* court failed to locate the specific sections which provide that the Rehabilitation Act applies to correctional institutions. *Id.* at 1351. The court looked at 28 C.F.R. § 42.503(f), the only section specifically cited in *Bonner*, and dismissed it as too general to establish that the DOJ intended the Rehabilitation Act to apply to prisons. The court did not mention the sections, in the definitional parts of the regulations, that indicate that the Rehabilitation Act applies to state prisons. *See* 28 C.F.R. §§ 42.540(h) and (j). The court similarly did not mention 28 C.F.R. § 35.190(b)(6), the regulation that specifies that the ADA applies to state prisons. The court intimated that, had the plaintiff been able to show that the regulations specifically applied to state prisons, it might have held differently. *Id.*

As discussed above, *Torcasio* also erroneously concluded that in *Gates* the Ninth Circuit retreated from its holding in *Bonner*. *Torcasio*, 57 F.3d at 1346, 1349 n. 7. Also, as noted by Plaintiffs, the questions raised in *Torcasio* as to whether prison programs qualify as "programs" under the Rehabilitation Act and the ADA, were answered in the affirmative by the Ninth Circuit in *Bonner*. *Bonner*, 857 F.2d at 562 ("the [Rehabilitation] Act's goals of independent living and vocational rehabilitation should in fact mirror the goals of prison officials as they attempt to rehabilitate prisoners and prepare them to lead productive lives. . . .")

II.
IMMUNITY UNDER THE ELEVENTH AMENDMENT

Defendants argue that the Eleventh Amendment provides them with immunity from liability under the Rehabilitation Act and the ADA. Defendants acknowledged, during oral argument, that their reasoning would lead to the conclusion that the Rehabilitation Act and the ADA are not applicable to any state agency.

In *Seminole Tribe v. Florida*, --- U.S. ----, ----, 116 S.Ct. 1114, 1123, 134 L.Ed.2d 252 (1996), the Supreme Court reiterated the principle that, pursuant to the Eleventh Amendment, States may not be sued in federal court unless Congress, acting pursuant to a valid exercise of its power, unequivocally expresses its intent to abrogate the States' immunity. *Id.* (citing *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985)). Defendants concede that Congress clearly expressed its intent in the Rehabilitation Act and the ADA to abrogate the States' immunity. The issue to be resolved is whether, in abrogating the States' immunity, Congress acted pursuant to a valid exercise of its power.

In *Seminole Tribe*, the Court explained that Congressional authority to abrogate States' immunity had been previously found under two provisions of the Constitution. *Id.*, --- U.S. at ----, 116 S.Ct. at 1125. In *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56, 96 S.Ct. 2666, 2669-72, 49 L.Ed.2d 614 (1976), the Court had held that § 5 of the Fourteenth Amendment allowed Congress to abrogate States' immunity from suit and, in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19-20, 109 S.Ct. 2273, 2284-85, 105 L.Ed.2d 1 (1989), the Court had held that the Interstate Commerce Clause granted Congress the power to abrogate immunity. *Id.* In *Seminole Tribe* the Court overruled *Union Gas* so that Congress now has authority to abrogate the States' immunity pursuant only to the Fourteenth Amendment. *Id.*, --- U.S. at ----, 116 S.Ct. at 1131.

Defendants argue that Congress lacks authority to abrogate their immunity under the Rehabilitation Act or the ADA because neither was validly enacted pursuant to the Fourteenth Amendment. Plaintiffs disagree, and also argue that Defendants, because they are state officials, are not immune from suit for injunctive relief under the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

A. The ADA Was Enacted Pursuant to the Fourteenth Amendment

The ADA specifically states that its purpose is "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day to day by people with disabilities." 42 U.S.C. § 12101(b)(4). In spite of this explicit statement by Congress, Defendants argue that simply because Congress has stated that the legislation was enacted pursuant to its Fourteenth Amendment authority does not make it so.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Section 5 of the Amendment states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." As explained by the Supreme Court, ". . . § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 648, 86 S.Ct. 1717, 1722, 16 L.Ed.2d 828 (1966). Section 5 is intended to provide to Congress the same broad powers expressed in the Necessary and Proper Clause, art. I, § 8, cl. 18. *Id.* at 650, 86 S.Ct. at 1723. The standard to be used in determining whether legislation is appropriate under the Necessary and Proper Clause was formulated in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421, 4 L.Ed. 579 (1819):

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist

> with the letter and spirit of the constitution, are constitutional.

Id.

[5] Using the *McCulloch* test, to determine if legislation enacted pursuant to the Fourteenth Amendment is appropriate, a court must determine whether the legislation: (1) is plainly adapted to the end of enforcing the Equal Protection Clause, and (2) is not prohibited by, but is consistent with the "letter and spirit of the constitution." *Morgan*, 384 U.S. at 651, 86 S.Ct. at 1723.

Defendants cite *Pierce v. King* for the proposition that the ADA is not adapted to enforcing the Fourteenth Amendment. *Pierce v. King*, 918 F.Supp. 932, 940 (E.D.N.C.1996). The argument in *Pierce* begins with the assumption that "[t]he Fourteenth Amendment has traditionally been understood as protecting individuals from state action that would infringe upon individual liberties." *Id.* The argument continues with the contention that the ADA is unlike traditional anti-discrimination laws because the ADA creates entitlements whereas the traditional laws seek to produce an environment in which individuals are treated in a neutral manner. *Id.* Defendants contend that mandates for prisons to conduct self-evaluations, complete transition plans, establish grievance procedures, and provide notice of the ADA to inmates are administrative burdens that are unconnected with the Fourteenth Amendment's prohibition against discrimination. They say that obligations to identify inmates with learning disabilities and to provide special programs for them distort notions of equal treatment. Similarly, they contend that the requirement of certain structural accessibility features goes far beyond anything that could be based on the Fourteenth Amendment.

The Court disagrees with Defendants' theory. Some of the findings made by Congress in enacting the ADA are that: (1) discrimination against disabled individuals in the form of isolation and segregation is a serious and pervasive social problem; (2) disabled individuals are a discrete and insular minority who have been subjected to a history of unequal treatment and relegated to a position of political powerlessness based upon false stereotypical assumptions; and, (3) the Nation's goals are to assure equality, full participation, independent living and economic self-sufficiency to individuals with disabilities. 42 U.S.C. § 12101(a). Congress indicated in the ADA that it intended to invoke its full authority under the Fourteenth Amendment to address nationwide discrimination against the disabled. 42 U.S.C. § 12101(b)(4).

Rectifying discrimination often has taken the form of the prohibition of action that is discriminatory. Perhaps, as Defendants argue, this is the traditional manner in which legislation under the Fourteenth Amendment has been framed. However, eliminating discrimination may require affirmative relief. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490, 109 S.Ct. 706, 720, 102 L.Ed.2d 854 (1989) (O'Conner, J., concurring and dissenting) ("The power to 'enforce' [the Fourteenth Amendment] may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.")

[6] The goal of the ADA, to eliminate discrimination against an identifiable group of individuals, is a proper invocation of the Equal Protection Clause. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47, 105 S.Ct. 3249, 3257-58, 87 L.Ed.2d 313 (1985) (holding that persons with disabilities are entitled to protection under the Fourteenth Amendment). The practical effect of the ADA will be to eliminate barriers against entry into physical structures, into ongoing programs and services,

and into the mainstream of society itself for many individuals with disabilities. While this may require affirmative measures on the part of correctional institutions to insure inclusion of those who are now excluded from the mainstream of prison life, the requirement of such measures does not exceed the authority granted to Congress under § 5 of the Fourteenth Amendment. The ADA, therefore, meets the first prong of the *McCulloch* test.

[7] Defendants have not argued that the ADA is inconsistent with the letter and spirit of the constitution. The Court, therefore, finds that the ADA meets the second prong of the *McCulloch* test. That Congress has invoked the Commerce Clause as well as the Fourteenth Amendment as authority for the ADA does not alter the conclusion that, under the *McCulloch* standard, the ADA is legitimate legislation, pursuant to the Fourteenth Amendment, focused on deterring discrimination on the part of the states. *See EEOC v. County of Calumet*, 686 F.2d 1249, 1253 (7th Cir.1982) (noting that Congress, in enacting modern civil rights legislation, reaches private discrimination indirectly through the Commerce Clause and reaches state discrimination directly through the Fourteenth Amendment). The Court holds that the ADA was legitimately enacted pursuant to Congress' authority under the Fourteenth Amendment.

B. The Rehabilitation Act was Enacted Pursuant to the Spending Clause and the Fourteenth Amendment

Unlike the ADA, the Rehabilitation Act is silent as to the constitutional authority under which it was enacted. Defendants contend that a close reading of the statute, together with an analogy to similar statutes, leads to the conclusion that the Rehabilitation Act is authorized by Congress' spending power, and not by the Fourteenth Amendment. That the Rehabilitation Act applies only to

those entities that receive federal funds is the primary basis for Defendants' contention.

[8] Defendants point to Title VI, 42 U.S.C. § 2000d et seq., and Title IX, 20 U.S.C. § 1681 et seq., of the Civil Rights Act of 1964 as support for their argument. Title VI prohibits discrimination on the basis of race, color, or national origin by any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d. Based upon the legislative history, the Supreme Court determined that Congress intended to enact Title VI pursuant to its spending power. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 598-99, 103 S.Ct. 3221, 3230-31, 77 L.Ed.2d 866 (1983). Title IX prohibits discrimination on the basis of sex by any educational program or activities receiving federal financial assistance. 20 U.S.C. § 1681(a). The Supreme Court has reserved the question of whether Title IX was enacted under the Spending Clause or under the Fourteenth Amendment. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 n. 8, 112 S.Ct. 1028, 1037 n. 8, 117 L.Ed.2d 208 (1992). The Fifth Circuit, in *Rowinsky v. Bryan Indep. Sch. Dist.*, for a variety of reasons, adopted the view that Title IX was enacted under the Spending Clause. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1012 n. 14 (5th Cir.1996), *petition for cert. filed*, 65 U.S.L.W. 3033 (U.S.July 1, 1996) (No. 96-4). First, Title IX was modeled after Title VI and uses identical language. That the Supreme Court in Guardians Ass'n held that Title VI was enacted pursuant to the Spending Clause strongly suggests that Title IX also was enacted under the Spending Clause. *Id.* Second, Title IX regulates purely private educational institutions. The receipt of federal funds does not transform a private school into a state actor for purposes of the Fourteenth Amendment. *Id.* Third, the funding incentives provided in Title IX indicate that Congress did not intend to impose absolute obligations on the States. *Id.* Defendants' argument that the Rehabilitation Act, like Titles VI and IX, is enacted under the Spending Clause

because it, too, applies only to those entities that receive federal funding is well-taken. However, the contentions of Plaintiffs and amicus that the Rehabilitation Act was enacted under the Fourteenth Amendment are also persuasive. Furthermore, because the language and purpose of the Rehabilitation Act are virtually identical to that of the ADA, and because this Court has found that the ADA was validly enacted pursuant to the Fourteenth Amendment, it follows that the Rehabilitation Act, also, was enacted under the Fourteenth Amendment.

Plaintiffs point out that two Supreme Court cases indicate that the Rehabilitation Act was passed under the Fourteenth Amendment. In *Atascadero State Hosp. v. Scanlon*, the Supreme Court stated, "Petitioners conceded . . . that the Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment. Thus, we first analyze § 504 in light of Congress' power under the Fourteenth Amendment to subject unconsenting States to federal court jurisdiction." *Scanlon*, 473 U.S. 234, 244 n. 4, 105 S.Ct. 3142, 3148 n. 4, 87 L.Ed.2d 171 (1985). Because the issue of Congressional authority was not in dispute in *Scanlon*, that case is not determinative of the issue. The Supreme Court noted in *Welch v. Texas Dept. of Highways and Pub. Transp.* that "[t]he question in *Scanlon* was whether § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, makes state agencies subject to suits for retroactive monetary relief in federal court. The Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment. Congress therefore had the power to subject unconsenting States to suit in federal court." *Welch*, 483 U.S. 468, 472 n. 2, 107 S.Ct. 2941, 2945 n. 2, 97 L.Ed.2d 389 (1987) (citing *Scanlon*). *Welch* provides further evidence that the Supreme Court considers that Congress enacted the Rehabilitation Act pursuant to the Fourteenth Amendment. But, this statement is dicta.

In *Dep't of Educ., State of Haw. v. Katherine D.*, the district court held that the Rehabilitation Act was enacted

pursuant to Congress' power under the Fourteenth Amendment. *Department of Education v. Katherine D.*, 531 F.Supp. 517, 530 (D.C.Haw.1982), *aff'd in part, rev'd in part on other grounds*, 727 F.2d 809 (9th Cir.1983), *cert. denied*, 471 U.S. 1117, 105 S.Ct. 2360, 86 L.Ed.2d 260 (1985). The court based its holding on its analysis of legislative history and Congress' intent, as specifically explicated in the Act, to effectuate equal opportunity for disabled citizens. *Id.* The court concluded that this legislative goal is "precisely the specific legislative intent to effectuate the equal protection rights guaranteed by the Fourteenth Amendment which [the Supreme Court] recognized." *Id.* (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976) and *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978)).

[9-11] Congress may enact legislation pursuant to more than one of its constitutional powers. *See EEOC v. County of Calumet*, 686 F.2d at 1253. The Court finds that Congress utilized its authority under the Spending Clause and under § 5 of the Fourteenth Amendment of the Constitution in enacting the Rehabilitation Act. Because the Court finds that Congressional authority for the ADA and the Rehabilitation Act arises in the Fourteenth Amendment, the Eleventh Amendment does not immunize Defendants from suit.

C. Doctrine of Ex parte Young

[12, 13] Even if Defendants were immune under the Eleventh Amendment, their immunity would be subject to the exception of *Ex parte Young*, 209 U.S. 123, 155-56, 28 S.Ct. 441, 452-53, 52 L.Ed. 714 (1908). *Ex parte Young* created an exception to the principle that States may not be sued in federal court unless they consent, or unless Congress, pursuant to a valid exercise of power, unambiguously expresses its intent to abrogate the States' immunity. *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct.

423, 426, 88 L.Ed.2d 371 (1985). *Ex parte Young* held that the Eleventh Amendment does not preclude federal courts from granting prospective injunctive relief to prevent individual state officials from violating federal law. *Young*, 209 U.S. at 155-56, 28 S.Ct. at 452-53; *Green*, 474 U.S. at 68, 106 S.Ct. at 426.

Citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687, 69 S.Ct. 1457, 1460, 93 L.Ed. 1628 (1949) superseded in part by 5 U.S.C. § 702, Defendants argue that *Young* is inapplicable because Plaintiffs' claims are essentially directed against the State, not against the individuals named in the suit. In *Larson*, the Court explained that a suit nominally addressed to a government employee, but which actually requires relief against the government, is barred because the court, in the absence of consent, has no jurisdiction over a suit against the government. *Larson*, 337 U.S. at 688, 69 S.Ct. at 1460. However, there are exceptions to this rule. Id. at 689, 69 S.Ct. at 1461. One exception is a case in which the statute conferring power on the government employee is unconstitutional, because the conduct against which relief is sought is beyond the employee's powers and is, therefore, not the conduct of the government. *Id.* at 690, 69 S.Ct. at 1461. This exception is based on the same reasoning as that relied upon in *Young*. "The theory of Young was that an unconstitutional statute is void, and therefore does not 'impart to [the official] any immunity from responsibility to the supreme authority of the United States'". *Green*, 474 U.S. at 68, 106 S.Ct. at 426 (citing *Young*, 209 U.S. at 159-60, 28 S.Ct. at 453-54). By the same token, *Young* also held that officials do not have immunity for a continuing violation of federal law. *Id.*

That courts have applied the *Young* doctrine in cases in which inmates sue state prison officials for violations of federal law is further evidence that Larson does not apply to the case at bar. *See e.g. Thompson v. Enomoto*, 915 F.2d 1383, 1390 (9th Cir.1990), *cert. denied* by *Rowland v.*

Thompson, 502 U.S. 1071, 112 S.Ct. 965, 117 L.Ed.2d 131 (1992) (holding that state officials not immune, under Young, from suits alleging constitutional violations); *Duran v. Carruthers*, 885 F.2d 1485, 1489 (10th Cir.1989), *cert. denied*, 493 U.S. 1056, 110 S.Ct. 865, 107 L.Ed.2d 949 (1990) (under *Young*, prison officials not immune from suit alleging violations of federal constitution and federal statutes). Here, Plaintiffs seek prospective injunctive relief only against state officials acting in their official capacity. Under these circumstances, *Larson* does not apply.

Defendants also argue that, because the ADA and the Rehabilitation Act have detailed enforcement schemes limiting remedies against the State, they come under the exception to *Ex parte Young* applied by the Supreme Court in *Seminole Tribe*. In *Seminole Tribe*, the Court stated that ". . . where Congress has prescribed a detailed scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole Tribe*, --- U.S. at ----, 116 S.Ct. at 1132.

The Indian Gaming Regulatory Act (the "IGRA") was the subject of the Court's inquiry in *Seminole Tribe*. *Id.*, at ----, 116 S.Ct. at 1119. The Court found that the IGRA provides for specific limited remedies against the State. *Id.* The Court reasoned that the limited statutory remedies would be superfluous if a state official could be exposed to the full remedial powers of a federal court in an action brought under *Ex parte Young*. *Id.*, at ----, 116 S.Ct. at 1133. The Court also reasoned that Congress' creation of the limited remedial scheme is a strong indication that it had no wish to expose States to liability under *Ex parte Young*. *Id.*

Defendants argue that, like the IGRA, the Rehabilitation Act and the ADA have limited remedial

schemes, but Defendants do not specify what they are. To the contrary, the Ninth Circuit has held that "the full panoply of remedies, including equitable relief and monetary damages" are available under the Rehabilitation Act. *Smith v. Barton*, 914 F.2d 1330, 1338 (9th Cir.1990), *cert. denied*, 501 U.S. 1217, 111 S.Ct. 2825, 115 L.Ed.2d 995 (1991); *see also Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. at 72-73, 112 S.Ct. at 1036-37 (stating that the Rehabilitation Act provides a private litigant the full panoply of remedies). The ADA specifically incorporates the "remedies, procedures, and rights" of the Rehabilitation Act. 42 U.S.C. § 12133. Under *Ex parte Young*, Defendants are not immune from this lawsuit.

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is DENIED.

IT IS SO ORDERED.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DERRICK CLARK and AMBROSE WOODS, Individually and on Behalf of all Others Similarly Situated,

Plaintiffs-Appellees,

UNITED STATES OF AMERICA,

Intervenor,

v.

STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF CORRECTIONS, PETE WILSIN, GOVERNOR; JOSEPH SANDOVAL, Sec. of Youth & Corr.; JAMES GOMEZ, DIRECTOR, Department of Corr.; KYLE S. McKINSEY; NADIM KHOURY, M.D., JOHN ZIL, Chief Psychiatric.

Defendants-Appellants.

No. 96-16952

D.C. No. CV-96-1486-FMS

OPINION

Appeal from the United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding

Argued and Submitted
June 9, 1997--San Francisco, California

Filed August 27, 1997

Before: Alfred T. Goodwin, Dorothy W. Nelson, and Stephen S. Trott, Circuit Judges.

Opinion by Judge Goodwin

SUMMARY

Individual Rights/Disabilities

The court of appeals affirmed a judgment of the district court. The court held that the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA) were validly enacted by Congress pursuant to its powers under the Enforcement Clause of the Fourteenth Amendment.

Appellee Derrick Clark and other disabled California prisoners sued appellant State of California and several of its officials, alleging claims under the ADA, § 504 of the RA, and 42 U.S.C. § 1983. The district court denied a defense motion to dismiss on the ground of Eleventh Amendment sovereign immunity, ruling that Congress validly abrogated the State's immunity. The State appealed.

[1] Under the Eleventh Amendment, a state is not subject to suit by its own citizens in federal court. However, Congress can abrogate a state's immunity from suit, or the state can waive it. **[2]** Congress unequivocally expressed its intent to abrogate thestates' immunity under both the ADA and the RA. The only issue was whether Congress acted udner a valid exercise of its power.

[3] Congress acts pursuant to a valid exercise of power in abrogating the immunity if Congress enacts legislation pursuant to the Enforcement Clause of the Fourteenth Amendmetn. A statute is appropriate legislation and may be regarded as an enactment to enforce the Equal Protection Clause if it is plainly adapted

to that end, and it is not prohibited but it consistent with the letter and spirit of the Constitution.

[4] Congress's power to pass legislation under the Fourteenth Amendment is very broad, and may create broader equal protection rights than the Constitution itself mandates. [5] At the same time, Congress's powers under the Fourteenth Amendment are not unlimited. The Supreme Court retains the power to decree the substance of the Fourteenth Amendment's restrictions on the states, and Congress may not enlarge those rights. Enforcement legislation must also evidence a congruence and proportionality between the injury to be prevented and the means adopted to that end.

[6] Discrimination against the disabled is a form of discrimination that is protected against by the Equal Protection Clause. The purpose of both the ADA and § 504 of the RA is to prohibit discrimination against the disabled. Both the ADA and the RA are therefore within the scope of appropriate legislation under the Equal Protection Clause. Neither provides remedies so sweeping that they exceed the harms that they are designed to redress. Both the ADA and the RA were validly enacted under the Fourteenth Amendment.

[7] The levels of scrutiny in equal protection cases are standards for determining the validity of the state legislation or other official action that is challenged. The State cited no case holding that these levels of scrutiny define the limits of Congress's power to enforce the Fourtenth Amendment.

[8] In enacting the ADA, Congress announced that it was acting pursuant to its Fourteenth Amendment powers. Although the constitutionality of action taken by Congress does not depend on recitals of power that it understakeks to exercise, courts give great deference to congressional statements.

[9] Supreme Court opinions have consistently considered § 504 to be enactyed pursuant to the Fourteenth Amendment, and the Ninth Circuit has expressly held that the RA was passed pursuant to § 5 of the Fourteenth Amendment.

[10] The RA includes an express waiver of Eleventh Amendment immunity that California accted when it accepted RA funds. Even if Congress has not abrogated a state's immunity under the Eleventh Amendment, a state may waive it. One way for a state to waive its immunity is to accept federal funds where the funding statute manifests a clear intent to condition participation in the funded programs on a state's consent to waive its immunity. [11] The RA manifests a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity. Because California accpted federal funds under the RA, California waived any immunity under the Eleventh Amendment.

COUNSEL

William Jenkins and James M. Humes, Deputy Attorneys General, San Francisco, California, for the defendants-appellants.

Caroline N. Mitchell, Pillsbury Madison & Sutro, San Francisco, California; Donald H. Spector, Prison Law Office, San Quentin, California, for the plaintiffs-appellees.

Seth M. Galanter, United States Department of Justice, Washington, D.C., for intervenor United States of America.

OPINION

GOODWIN, Circuit Judge:

The State of California appeals the denial of its motion to dismiss on the ground that the Eleventh Amendment bars this action against the state. Plaintiffs sued under Title II of the Americans With Disabilities Act, 42 U.S.C. §§ 12131-34 ("ADA"), and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("section 504" or "Rehabilitation Act"). We agree with the district court that both acts are valid exercises of Congress's power under Section 5 of the Fourteenth Amendment, and we affirm.

JURISDICTION

This court has jurisdiction to hear an interlocutory appeal from an order denying a state's motion to dismiss on the ground of immunity under the Eleventh Amendment. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

FACTS

Plaintiffs allege that they are a class of all individuals who have developmental disabilities, that they are incarcerated in correctional facilities operated by the State of California, and that they have suffered discrimination because of their disabilities. Plaintiffs seek injunctive relief under the ADA, the Rehabilitation Act, and 42 U.S.C. § 1983 against the State of California and the named state officials in their official capacities. Plaintiffs allege in part that the defendants have discriminated against them based on their disabilities.

The State of California moved to dismiss the complaint, claiming immunity under the Eleventh Amendment to suits brought under the ADA and the

Rehabilitation Act. The district court denied the motion, holding that Congress had validly abrogated the State's immunity. California now appeals.

DISCUSSION

[1] Under the Eleventh Amendment, a state is not subject to suit by its own citizens in federal court. U.S. Const. amend. XI; Edelman v. Jordan, 415 U.S. 651, 662 -63 (1974). Congress can, however, abrogate a state's immunity to suit, or the state can waive it. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240-41 (1985).

We first inquire whether Congress properly abrogated the immunity of the state from suit by applying *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996). The *Seminole Tribe* test contains two parts: "first, whether Congress has'unequivocally expressed its intent to abrogate the immunity;' and second, whether Congress has acted 'pursuant to a valid exercise of power' " in abrogating the immunity. *Id.* at 1123 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

[2] Here, Congress has unequivocally expressed its intent to abrogate the State's immunity under both the ADA and the Rehabilitation Act. Section 42 U.S.C. § 12202 of the ADA explicitly states, "A State shall not be immune under the eleventh amendment." *See also Duffy v. Riveland*, 98 F.3d 447, 452 (9th Cir. 1996). Similarly, 42 U.S.C. S 2000d-7(a)(1) of the Rehabilitation Act explicitly states, "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973. " The only issue before this court, therefore, is whether Congress acted under a valid exercise of its power.

[3] Under the Supreme Court's decision in Seminole Tribe, Congress "act[s] pursuant to a valid exercise of

power" in abrogating the immunity if Congress enacts legislation pursuant to the enforcement clause of the Fourteenth Amendment. *Seminole Tribe*, 116 S. Ct. at 1123, 1125. The parties agree that a statute is "appropriate legislation" to enforce the Equal Protection Clause if the statute "may be regarded as an enactment to enforce the Equal Protection Clause, [if] it is 'plainly adapted to that end' and [if] it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'" *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

[4] The Supreme Court has defined the Equal Protection Clause to mean "that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne LivingCtr., Inc.*, 473 U.S. 432, 439 (1985) (internal quotations omitted). Congress's power to pass legislation under the Fourteenth Amendment is very broad. As the Supreme Court explained:

> Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislationis needed to secure the guarantees of the Fourteenth Amendment.

Katzenbach, 384 U.S. at 651. The Fourteenth Amendment gives Congress the same broad powers as does the Necessary and Proper Clause. See id. at 650. Congress's powers under the Fourteenth Amendment extend beyond conduct which is unconstitutional, and Congress may create broader equal protection rights than the Constitution itself mandates. *See id.* at 648-49.

[5] At the same time, Congress's powers under the Fourteenth Amendment are not unlimited. The Supreme Court retains the power to decree the substance of the Fourteenth Amendment's restrictions on the states, and

Congress may not enlarge those rights. *City of Boerne v. P.F. Flores*, 117 S. Ct. 2157, 2166 (1997). Also, enforcement legislation must evidence a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. *Id.* at 2169. Congress acts within its authority under the Fourteenth Amendment if the court can perceive a basis upon which Congress might predicate a judgment that the state action "constituted an invidious discrimination in violation of the Equal Protection Clause." *Katzenbach*, 384 U.S. at 656.

[6] The Supreme Court has previously held that discrimination against the disabled is a form of discrimination protected under the Equal Protection Clause. *See City of Cleburne*, 473 U.S. at 450. Here, the purpose of both the ADA and section 504 of the Rehabilitation Act is to prohibit discrimination against the disabled. *See* 42 U.S.C. § 12101(b) (ADA); 29 U.S.C. § 701(b)(1)(F) (Rehabilitation Act). In both acts, Congress explicitly found that persons with disabilities have suffered discrimination. **See** 42 U.S.C. § 12101(a) (ADA); 29 U.S.C. § 701(a)(5) (Rehabilitation Act). Both the ADA and the Rehabilitation Act therefore are within the scope of appropriate legislation under the Equal Protection Clause as defined by the Supreme Court. At the same time, neither act provides remedies so sweeping that they exceed the harms that they are designed to redress. We therefore agree with the district court that both the ADA and the Rehabilitation Act were validly enacted under the Fourteenth Amendment.

[7] We reject California's argument that Congress's power must be limited to the protection of those classes found by the Court to deserve "special protection" under the Constitution. The State does not explain why the Court's choice of a level of scrutiny for purposes of judicial review should be the boundary of the legislative power under the Fourteenth Amendment, nor have we found any case to so hold. The levels of scrutiny in equal

protection cases are "standards for determining the validity of state legislation or other official action that is challenged as denying equal protection." *City of Cleburne*, 473 U.S. at 439-40. The State cites no case which holds that these levels of scrutiny define the limits of Congress's power to enforce the Fourteenth Amendment.

[8] In our holding with respect to the ADA, moreover, we follow Congress's own determination of its powers. In enacting the ADA, Congress announced that it was acting pursuant to its Fourteenth Amendment powers. *See* 42 U.S.C. § 12101(b)(4). Although "the constitutionality of action taken by Congress does not depend on recitals of power which it undertakes to exercise," *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948), we give great deference to congressional statements. *See, e.g., Wilson-Jones v. Caviness*, 99 F.3d 203, 210 (6th Cir. 1996) (holding that a clear indication from Congress is the simplest way to show that a statute is enacted under the Fourteenth Amendment), amended on other grounds, 107 F.3d 358 (6th Cir. 1997).

[9] Also, in our holding with respect to the Rehabilitation Act, we follow past decisions of our court as well as those of the Supreme Court. Supreme Court opinions have consistently considered section 504 to be enacted pursuant to the Fourteenth Amendment. In its opinion in Atascadero, the Supreme Court assumed without deciding that the Rehabilitation Act was enacted under the Fourteenth Amendment. *See Atascadero*, 473 U.S. at 244 n.4. In dicta in a later case, the Supreme Court expressly noted that "[t]he Rehabilitation Act was passed pursuant to S 5 of the Fourteenth Amendment." *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 472 n.2 (1987). Moreover, our own court has expressly held that the Rehabilitation Act was enacted under the Fourteenth Amendment. *See Scanlon v. Atascadero State Hosp.*, 735 F.2d 359, 361 (9th Cir. 1984), rev'd on other grounds, 473 U.S. 234 (1985).

[10] We note also that the Rehabilitation Act includes an express waiver of Eleventh Amendment immunity which California accepted when it accepted Rehabilitation Act funds. Even if Congress has not abrogated a state's immunity under the Eleventh Amendment, a state may waive it. *See Seminole Tribe*, 116 S. Ct. at 1128. One way for a state to waive its immunity is to accept federal funds where the funding statute "manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S. at 247.

[11] In this case, the Rehabilitation Act manifests a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity. The amended Rehabilitation Act provides:

> (1) A State shall not be immune under the Eleventh Amendment . . . from any suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . of the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000-7. The Supreme Court has characterized this section as "an unambiguous waiver of the States' Eleventh Amendment immunity." *Lane v. Pena*, 116 S. Ct. 2092, 2100 (1996). Because California accepts federal funds under the Rehabilitation Act, California has waived any immunity under the Eleventh Amendment.

Finally, we note that plaintiffs' suit may go forward against the named officials under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *See Armstrong v. Wilson*, No. 96-16870 (9th Cir. _____, 1997).

AFFIRMED.

Derrick CLARK, et al., Plaintiffs,

v.

STATE of California, et al., Defendants.

No. C 96-1486-FMS.

United States District Court, N.D. California.

Oct. 1, 1996.

Developmentally disabled state prisoners brought suit on behalf of themselves and all developmentally disabled prisoners for injunctive relief under Rehabilitation Act (RA) and Americans with Disabilities Act (ADA), and under § 1983 for violation of their constitutional rights. State officials moved to dismiss. The District Court, Fern M. Smith, J., held that: (1) state officials were not immune from suit; (2) prisoner stated claims for violation of RA, ADA, and Eighth Amendment; but (3) prisoners failed to state claim, under § 1983, for violation of their due process rights.

Granted in part and denied in part.

ORDER DENYING IN PART, GRANTING IN PART, DEFENDANTS' MOTION TO DISMISS

SMITH

ISSUES

Defendants' motion to dismiss requires the Court to consider (1) whether plaintiffs have standing to bring their claims; (2) whether Section 504 of the Rehabilitation Act of 1973 ("IRA" or "Section 504"), 29 U.S.C. § 794, and Title II of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12131-34, are applicable to state prisons; (3)

whether the Eleventh Amendment immunizes defendants from a su,it based on the RA or the ADA; and (4) whether plaintiffs sufficiently pled their claims under the RA, ADA, and 42 U.S.C. § 1983 (" § 1983") to survive a motion to dismiss.

INTRODUCTION

Plaintiffs, Derrick Clark and Ambrose Woods, two developmentally disabled state prisoners, brought suit on behalf of themselves and all developmentally disabled prisoners confined at various correctional facilities operated by the State of California through the California Department of Corrections for injunctive relief under the RA and the ADA. Plaintiffs also brought a claim under § 1983 for violations of their Sixth, Eighth, and Fourteenth Amendment rights. Defendants, the State of California, the California Department of Corrections, and various-California state officials being sued in their official capacities, have filed a motion to dismiss plaintiffs, first, second, and part of plaintiffs, third causes of action pursuant to Federal Rule of Civil Procedure 12(b)(6).[1/]

BACKGROUND

The facts set forth in this section are based on plaintiffs, allegations and are presumed true for purposes of this motion.

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1. The named individual defendants are Pete Wilson, Governor; Joseph Sandoval, Secretary of Youth and Corrections; James Gomez, Director of the Department of Corrections; Kyle S. McKinsey, Deputy Director for Health Care Services; Nadim Khoury, M.D., Assistant Deputy Director for Medical Service; and John S. Zil, M.D., Chief, Psychiatric Services (although parties have informally agreed that defendant Zil does not serve in the official capacity as alleged in the complaint, and the parties intend to substitute the proper state official for Dr. Zil at a later date).

Plaintiff Derrick Clark ("Clark") is currently incarcerated at Pelican Bay State Prison. Clark has been incarcerated at San Quentin State Prison; California State Prison, Solano; Correctional Training Facility, Soledad; and Mule Creek State Prison. Clark is developmentally disabled and has an I.Q. of less than 60. Clark can neither read nor write, except to sign his name. Plaintiff Ambrose Woods ("Woods") is currently incarcerated at North Kern State Prison and was previously incarcerated at Pelican Bay State Prison. He is also developmentally disabled and a slow learner and, like Clark, has difficulty understanding prison rules and disciplinary procedures.

Clark, Woods, and similarly situated class members cannot obtain necessary and adequate accommodations, protection, and services because of their disabilities. For instance, Clark was denied medication because of his "stupidity" and, although recommended for placement in Category K, a designation for prisoners with mental retardation, he was denied access to the program. Woods was denied access to work and education programs and was rejected from a reading program because of his "stupidity." Furthermore, because they are less able to comply with prison rules and procedures, they are more likely to be forced into isolation or segregation and to be deprived of good time credits and other services, benefits, and privileges available to non-disabled prisoners. Plaintiffs also claim that they have been subjected to a variety of administrative proceedings, including disciplinary actions, without adequate assistance to help them understand the proceedings and the rights implicated by them. Clark and Woods are also more likely to be physically and mentally abused by the general prison population because of their disabilities.

Plaintiffs seek injunctive and declaratory relief, demanding: that defendants ensure that disabled inmates are apprised of and understand the administrative proceedings to which they are subjected and the rights

implicated thereunder; that defendants grant disabled inmates access to educational programs, medical services, and other activities generally open to non-disabled prisoners; and that defendants take reasonable steps to ensure the health and safety of disabled inmates.

DISCUSSION

I. The Legal Standard.

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. *North Star Int v. Arizona Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir.1983). Dismissal of an action pursuant to Rule 12(b)(6) is appropriate only if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1482 (9th Cir.1991) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46). In reviewing the motion, the Court must assume all factual allegations to be true and must construe them in the light most favorable to plaintiff, the nonmoving party. *North Star*, 720 F.2d at 580. Legal conclusions, however, not be taken as true merely because they are cast in the form of factual allegations. *Western Mining Council Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 45 1031 (1981).

II. Plaintiffs' Standing to Seek Injunctive and Declaratory Relief.

[1, 2] The Supreme Court has developed a three-part test for standing, a constitutional prerequisite inherent in Article III's "case or controversy" requirement. The first element is "injury in fact:" plaintiff must have suffered . . . "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent', not 'conjectural, or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992). The second and

third elements of the test are causation and redressability. *Id.*

In this case, the RA, ADA, and § 1983 create the legal rights that plaintiffs allege were violated by defendants. *See infra*, parts III., IV., V., VI. Plaintiffs allege they are denied access to programs, benefits, and activities because of their disabilities. Plaintiffs also allege that they are treated differently than non-disabled inmates because of their disabilities. Plaintiffs further allege that they are more susceptible to physical and mental abuse because they are disabled, Although by no means detailed, the plaintiffs, complaint contains a few examples of the direct and actual injuries allegedly incurred by Clark and Woods. Furthermore, defendants are the cause of the injuries, and action by this Court could redress plaintiffs' alleged injuries. Accordingly, this Court finds that Clark and Woods have standing to pursue their RA, ADA, and § 1983 claims.

Defendants argue that Clark and Woods do not have standing to pursue claims based on injuries to other developmentally disabled prisoners who are incarcerated in different prisons. This argument is premature. Defendants have confused plaintiffs, standing with their adequacy to serve as class representatives, which is a question more appropriately addressed in connection with the class certification determination.

III. Application of the RA and the ADA to State Prisons.

A. The RA.

[3] Despite clear Ninth Circuit authority that the RA applies to state prison facilities, *Bonner v. Lewis*, F.2d 559, 562 (9th Cir.1988), defendants ask this Court to conclude otherwise. Since *Bonner*, defendants argue, the Supreme Court has changed the review of the applicability of

federal statutes to states so that absent a clear indication of congressional intent to apply the RA to state prisons, a court cannot assume Congress intended to do so. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-461 (1991) (applying "plain statement rule").

Defendants cite two cases to support their claim that Bonner was wrongly decided because it failed to apply the plain statement rule. In *Hale v. Arizona*, 993 F.2d 1387, 1393, 1395 (9th Cir.) (en banc), *cert. denied*, U.S. 946 (1993), the Ninth Circuit refused to extend the Federal Labor Standards Act to state inmates required by state law to work at hard labor. In *Jeldness v. Pearce*, F.3d 1220, 1225 (9th Cir.1994), the Ninth Circuit held that Title IX, an anti-discrimination statute, applied to state prisons. In both Hale and Jeldness, the court relied partially on a review of statutory construction and congressional intent. *Hale*, 993 F.2d at 1392; Jeldness, 30 F.3d at 1225.

Defendants contend that the *Bonner* Court focused solely on the expansive language of the RA, thereby violating the scope of review as spelled out in Hale and Jeldness. The plain statement rule "announced" in Gregory however, has long been a part of this country's jurisprudence; thus, defendants take too far a leap in concluding that the Ninth Circuit did not take this rule into account when deciding *Bonner*. *See United States v. Bass*, 404 U.S. 336, 349 (1971) (requirement of clear statement in traditionally sensitive areas); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (intention should be clear if Congress intends to pre-empt historic powers of the states). Although not explicitly stated, the *Bonner* Court did look for Congressional intent to apply the RA to state prisons. For instance, the court found that the plain language of the RA and its implementing regulations, 28 C.F.R. § 42.503(f), confirms that Section 504 applies to state prisons. *Bonner*, 857 F.2d at 562.

According to defendants, the *Bonner* Court's reliance on the Department of Justice's "DOJ") implementing regulations was inappropriate because the plain language rule requires the Court to look at congressional intent, an intent not properly gleaned from an interpretation by an executive branch agency, such as the DOJ. According to the Supreme Court, however, when Congress explicitly delegates its authority to "construe the statute by regulation," as was done with the RA, 29 U.S.C. § 794(a), a court must give the regulations "controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute." *United States v. Morton*, 467 U.S. 822, 834 (1983); see also *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 279-280 (198 (emphasizing that federal regulations are "an important source of guidance on the meaning of § 504") (quoting *Alexander v. Choate*, 469 U.S. 287, 304 n. 24 (1985)). Ninth Circuit therefore properly looked to the RA's implementing regulations in *Bonner*.

Defendants also claim that Bonner is inapposite because that ruling relied, in part, on the Ninth Circuit's determination that the RA's goal of rehabilitation mirrors the goals of Arizona's prison system, *see Bonner*, 857 at 562, while it is defendants, contention that the only goal of California's prison system is punishment. Plaintiffs cite numerous statutes in the California Penal Code and Regulations, however, which indicate that the goal of many prison programs is much broader than that. Defendants' contention does not change the precedential authority of *Bonner*.

In short, defendants, challenges to *Bonner v. Lewis* are unavailing; therefore, the Court concludes that the RA applies to state prisons.

B. The ADA.

[4] Defendants again argue that if this Court applies the plain statement rule, it should find that the ADA does

not apply to state prisons. The Court does not agree. First, the plain language of the statute indicates that the ADA expands the reach of the federal anti-discrimination policy of the RA to "any public entity". Second, as it did with the RA, Congress explicitly delegated its authority to the DOJ to create implementing regulations for the ADA. 42 U.S.C. § 12134(a). The DOJ's regulations explicitly state that state correctional facilities are governed by the ADA. 28 C.F.R. § 35.190(b)(6).

Consequently, because of the expansive language of the ADA and the DOJ's implementing regulations, the Court finds that the ADA applies to state prisons. This result is consistent with the ADA's legislative history, which "indicates that Congress intended judicial interpretation of the RA [to] be incorporated by reference when interpreting the ADA." *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 n. 3 (9th Cir.1995), *cert. denied*, 116 S.Ct. 711 (1996).

The Court must also reject defendants' argument that federal courts should not immerse themselves in the running of integral state functions, such as the state prison system. Although most federal judges would strongly prefer not to take on such supervisory oversight, there is validity to the Department of Justice's argument that, "[w]hile federal courts have acknowledged that deference is due to the decision of state officials, the courts cannot abdicate their duties to enforce important civil rights protections." United States Amicus Curiae Memorandum of Law in Support of Defs., Motion for Summary Judgment, *Armstrong v. Wilson*, No. 94-2307 (Wilken, J.) (N.D. Cal filed Sept. 20, 1996); *see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) (states are not immune from federal regulation of their "integral state functions").

IV. Defendants' Immunity From Suit on Plaintiffs' ADA and RA Claims.

Defendants argue that plaintiffs, RA and ADA claims against the state defendants should be dismissed because states are immune from liability in federal court under the Eleventh Amendment.[2]

[5, 6] The Eleventh Amendment generally bars citizen suits against a state and its agencies and instrumentalities. *Seminole Tribe of Fla. v. Florida*, S.Ct. 1114, 1124-25, 1127-28 (1996); *Francheschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir.1995) (California Municipal court is arm of state protected from lawsuit by 11th Amendment immunity); *Bennett v. California*, 406 F.2d 36, 39 (9th Cir.1969), *cert. denied*, 394 U.S. 966 (1969) (State agencies such as the California Adult Authority and California Department of Corrections are arms of the State.). Eleventh Amendment immunity can, however, be waived by the state or expressly abrogated by Congress. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240-241 (1985).

[7] To abrogate state immunity, Congress must (1) unequivocally express its intent to abrogate the immunity, and (2) act pursuant to a valid exercise of power. *Seminole Tribe*, 116 S.Ct. at 1123-32. An exercise of power is valid if Congress acts pursuant to a constitutional provision granting Congress the power to abrogate. *Seminole Tribe*, 116 S.Ct. at 1125. In *Seminole Tribe*, the Supreme Court held that the Fourteenth Amendment grants Congress the power to enact laws abrogating states, immunity under the Eleventh Amendment. *Id.*

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2. This Court will not address any potential sovereign immunity defense to plaintiffs' § 1983 claim, which defendants failed to raise in their brief.

As plaintiff and defendant agree, both the ADA and the RA contain expressions of an unequivocal intent by Congress to abrogate state immunity. 42 U.S.C. § 12202; 42 U.S.C. § 2000d-7(a)(1). The first prong of the Seminole test is, therefore, satisfied. The remaining question is whether-Congress enacted the ADA and the RA pursuant to the Fourteenth Amendment, in which case immunity would be effectively abrogated, or whether Congress acted pursuant to another constitutional provision, in which case states would remain immune from suit.

A. Plaintiffs' RA Claim.

[8] Defendants claim that the RA was enacted pursuant to Congress's spending power rather than the Fourteenth Amendment, primarily because the statute applies only to those entities that receive federal funds. Defendants also argue that the RA was modeled after Title VI and Title IX, two statutes previously determined to have been passed pursuant to the Spending Clause. Defendants then conclude that Congress does not have the authority to abrogate state immunity from suits brought under the RA.

Given the similarity of the RA to the ADA, see infra, part IV.B., and indications by the Supreme Court, however, this Court concludes that the RA was passed, at least in part, pursuant to the Fourteenth Amendment. In *Atascadero*, 473 U.S. at 244 n. 4, the Supreme Court accepted the point, conceded by the parties, that the RA was enacted under the Fourteenth Amendment and proceeded to use that assumption as a basis for part of its interpretation of the RA. Because the issue was not in dispute, however, Atascadero did not definitively an the question. Further support for this Court's interpretation of the source of the RA is found in *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 472 n. 2 (1987), in which the Supreme Court noted, in dicta, that

"[t]he RA was passed pursuant to § 5 of the Fourteenth Amendment."

Other courts have also followed the Supreme Court's lead. For instance, in *Department of Education Katherine D.*, 531 F.Supp. 517, 530 (D.Haw.1982), *aff'd in part, rev'd in part on other grounds*, 727 F.2d 809 (9th Cir.1983), *cert. denied*, 471 U.S. 1117 (1985), the court stated: "The legislative history of . . . section 504 leaves no doubt that [it] was enacted pursuant to Congress' power under the 5th section of the Fourteenth Amendment. . . ." *See also, Miener v. Missouri*, 673 F.2d 969, 974 n. 4 (8th Cir.1982), *cert. denied*, 459 U.S. 909 (1982) (stating without deciding that Section 504 arguably rests on Congress' power to secure the guarantees of the Fourteenth Amendment); *Brotherhood of Locomotive Engineers v. New Jersey Transit Rail Operations, Inc.*, 618 F.Supp. 1456, 1457 (S.D.N.Y.1985) (noting that Atascadero concerned a statute [the RA] enacted in furtherance of equal protection, as authorized by the Fourteenth Amendment).

B. Plaintiffs, ADA Claim.

The ADA was enacted to help Congress enforce the Fourteenth Amendment; the act expressly states this purpose. 42 U.S.C. § 12101(b)(4). Defendants argument that the affirmative obligations imposed on the states by the ADA are outside the scope of the Fourteenth Amendment because the Fourteenth Amendment was intended to ensure equal treatment, not equal opportunity, is unpersuasive.

First, the Supreme Court has confirmed that the Fourteenth Amendment's Equal Protection Clause gives Congress the power to protect people with disabilities from discrimination. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985). Second, both the ADA and RA are, as required by § 5 of the Fourteenth Amendment, "appropriate legislation" to enforce the

Equal Protection Clause. *See Katzenbach v. Morgan*, 384 U.S. 641, 649-50, 651 (1966) (legislation must be (1) plainly adapted to the end of enforcing the Equal Protection Clause, and (2) not prohibited by, but rather consistent with, the "letter and spirit" of the constitution).

The ADA, as well as the RA, are designed to prevent discrimination based on disability by government or other public actors. Both statutes are aimed at preventing discrimination based on disability in programs, services, and activities provided by covered entities. Both statutes, therefore, may be regarded as having been enacted to enforce the protections of the Equal Protection Clause.

Both the ADA and RA are also consistent with the "letter and spirit" of the Constitution. Section 5 of the Fourteenth Amendment authorizes Congress to amplify the Fourteenth Amendment's substantive protections. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (O'Connor, J., concurring and dissenting) (Congress, power to enforce the Fourteenth Amendment includes "the power to . . . adopt prophylactic rules to deal with those situations" that threaten principles of equality.). Consequently, Congress may enact laws designed to ensure equality notwithstanding the possible disparate effect those laws may have on various groups.[3]

In sum, because the RA and ADA were enacted pursuant to the Fourteenth Amendment, Congress

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3. It is also true, as defendants contend, that the ADA was partly enacted pursuant to the Commerce Clause. Congress, however, may enact legislation pursuant to more than one of its constitutional powers. *See EEOC v. County of Columet*, 686 F.2d 1249, 1253 (7th Cir.1982). Furthermore, the Fourteenth Amendment, rather than the Commerce Clause, is the traditional constitutional authority for legislation proscribing state conduct. *See id.*

satisfied the second prong of the Seminole test and properly abrogated Eleventh Amendment immunity.[4/5]

V. Sufficiency of Allegations Under the RA and ADA.

[9] Plaintiffs claim that defendants violated Section 504 of the RA and Title II of the ADA by denying them access to and the benefits of education, work programs, and other activities solely because of their disabilities. Section 504 of the RA provides, in pertinent part:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794(a). Title II of the ADA provides, in pertinent part:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

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4. Because this Court has already decided that defendants are not immune to suit, this Court need not consider *Ex parte Young*, 209 U.S. 123 (1908), and progeny.

5. The reasoning and conclusion above are consistent with this courts, opinion in *Armstrong v. Wilson*, No. 2307 (Wilken, J.) (N.D. Cal. filed Sept. 20, 1996), a case which involved similar facts to the case now before this Court. That case held that the RA and ADA are applicable to state prisons and that the Eleventh Amendment did not immunize the state entity defendants from suit under the RA and ADA.

42 U.S.C. § 12132.

The Court will analyze the sufficiency of plaintiffs' allegations under the RA and the ADA jointly because "[t]he remedies, procedures, and rights under Title II of the ADA are the same as under the RA." Bullock v. Gomez, 929 F.Supp. at 1303 n. 3.[6]

To prove an RA violation, Clark and Woods must demonstrate that: (1) they are handicapped persons; (2) they are otherwise qualified for the benefit they seek; (3) the relevant program receives federal financial assistance; and (4).defendants' refusal to provide a service or grant access to a program impermissibly discriminates against them on the basis of their physical handicaps. *Bonner v. Lewis*, 857 F.2d at 562-63.

Defendants apparently do not dispute that Clark and Woods are disabled within the meaning of the PA and the ADA or that California state prisons receive federal financial assistance. "To be 'qualified' a handicapped person must meet 'the essential eligibility requirements for the receipt of [program] services.'" *Bonner v. Lewis*, 857 F.2d at 563 (quoting 28 C.F.R. § 42.540(i)(2)). The *Bonner* Court concluded that prison inmates were "qualified (sometimes required) to participate in activities such as disciplinary hearings rehabilitation, medical services, and other prison activities." *Id.* The Court also finds that plaintiffs, complaint sufficiently alleges both the denial of benefits and access to programs as well as the discriminatory basis for that denial. Consequently, the plaintiffs have satisfied their pleading burden as to their RA and ADA claims.

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6. Any differences in the standards are not critical at this stage of the proceedings.

VI. Sufficiency of Allegations Under § 1983.

To state a claim under § 1983, Clark and Woods must show that defendants acted under color of law, and that defendants' conduct deprived plaintiffs of a constitutional right. *West v. Atkins*, 487 U.S. 42, (1988). The parties do not dispute that the prison officials acted under color of law. The parties do dispute, however, whether defendants violated plaintiffs, constitutional rights. The Court must decide, therefore, whether the plaintiffs have sufficiently pled the deprivation of a constitutionally protected liberty interest under the Due Process Clause, whether plaintiffs sufficiently pled a violation of their equal protection rights, and whether plaintiffs sufficiently pled that they were subjected to cruel and unusual punishment.

A. Fourteenth Amendment.

1. Liberty Interests Created by the Due Process Clause and the State.

Interests protected by the Due Process Clause may arise from two sources--the Due Process Clause itself or state law. *Meachum v. Fano*, 427 U.S. 215, 223- 27 (1976). Due process claims in the prison context generally pertain to liberty.

[10] Changes in conditions so severe as to affect the sentence imposed in an unexpected manner implicate the Due Process Clause itself, whether or not they are authorized by state law. *Sandin v. Conner*, 115 S.Ct. 2293, 2300 (1995) (citing Vitek v. Jones, 445 U.S. 480, 493 (1980) (transfer to mental hospital), and *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (involuntary administration of psychotropic drugs)). A state may not impose such changes without complying with the minimum requirements of due process. *Sandin*, 115 S.Ct. at 2300.

[11] As the Sandin standard indicates, liberty interests arising from the Due Process Clause itself are very limited in the prison context. Plaintiffs due process claims are based on the deprivation of good time credits and placement in segregation. Plaintiffs' claims do not meet the threshold requirement imposed in order to state a successful due process claim because receiving punishment after a disciplinary hearing is part of prison life and does not change the sentence itself in an unexpected manner.

[12] Deprivations that are less severe or more closely related to the expected terms of confinement, however, may also amount to deprivations of a procedurally protected liberty interest, provided state statutes or regulations narrowly restrict the power of prison officials to impose the deprivation, and the liberty in question is one of "real substance." *Sandin*, 115 S.Ct. at 2297-2302. *See Gotcher v. Wood*, 66 F.3d 1097, 1100-01 (9th Cir.1995) (looking at both language of regulation and substance of deprivation to determine whether prisoner has interest protected by the Due Process Clause after Sandin). "Real substance" is generally limited to freedom from (1) restraint that imposes "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," or (2) state action that "will inevitably affect the duration of [a] sentence." *Sandin* at 2300, 2302.

California's regulations concerning discipline provide explicit standards that fetter official discretion, and thus meet the "narrowly restrict" prong of the *Sandin* test. *See Walker v. Sumner*, 14 F.3d 1415, 1419 (9th 1994) (Nevada's prison discipline regulations, which are similar to California's, create a liberty interest.). Under California Code of Regulations title 15, § 3320(1), officials must find that a preponderance of the evidence substantiates a charge before guilt may be found and punishment assessed. Absent such a finding, the inmate may not be placed in isolation or segregation or lose

good-time credits. *See also* Cal.Code Regs. tit. § 5, § 332 (requiring notice), § 3320(b) (requiring hearing).

Plaintiffs, deprivation must also satisfy the "real substance" prong of the Sandin test. Plaintiffs claim that they suffer an atypical and significant hardship because they are more likely to be deprived of good time credits or placed in segregation after disciplinary proceedings, for which they are not given adequate assistance.

The Ninth Circuit has found that the loss of good-time credits is a deprivation of "real substance" which entitles prisoners to due process. *Gotcher v. Wood*, 66 F.3d, 1097, 1100-1101 (9th Cir.1995) (liberty interest created when regulation limits circumstances under which credits may be taken away).[7]

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7. Because this Court has already decided the issue of standing in favor of plaintiffs, the Court will not address defendants' argument that plaintiffs' failure to specify such an instance means they do not have standing to challenge disciplinary actions.

The Court also disagrees with defendants' argument that plaintiffs' Fourteenth Amendment claims which implicate the loss of good time credits must be brought as habeas actions after exhausting state administrative remedies. This principle generally applies when prisoners are seeking to reinstate good time credits that have already been taken away, a remedy plaintiffs have not asked this Court to consider. *See United States v. Checchini*, 967 F.2d 348, 350 (9th Cir.1992).

Heck v. Humphrey, 114 S.Ct. 2364 (1994), cited by defendants, did bar a claim of unconstitutional deprivation of time credits because such a claim necessarily called into question the lawfulness of the duration of the plaintiff's sentence. *Sheldon v. Hundley*, 83 F.3d 231, 233 (8th Cir.1996). A § 1983 claim "for using the wrong procedure . . . . not for reaching the wrong result (i.e., the denial of good-time credits)," however, is cognizable. *Gotcher v. Wood*, 66 F.3d at 1099 (citing *Heck*, 114 S.Ct. at 1270). In this case, because plaintiffs' due process claim is directed toward the procedure, not the result, plaintiffs' claim is cognizable.

Whether placement in segregation creates a liberty interest, however, is a more complicated question. Prior to *Sandin*, in *Toussaint v. McCarthy*, 801 F.2d 1080, 1098 (1986), *cert. denied*, 481 U.S. 1069 (1987), the Ninth Circuit held that California statutes and prison regulations created a liberty interest in freedom from administrative segregation.

That case, however, did not analyze whether segregation was a sanction of "real substance," an important omission given *Sandin*, because the determination of whether a liberty interest has been created depends largely on factual issues, such as the conditions and length of confinement, which vary from case to case. *See Gotcher*, 66 F.3d at 1101 (record insufficient to determining whether placement in segregation was an atypical and significant hardship); *Mujahid v. Meyer*, 59 F.3d 931, 932 (9th Cir.1995) (despite prior case law determining disciplinary regulations created liberty interest, under *Sandin*, no liberty interest when inmate placed in disciplinary segregation for 14 days).

[13] In this case, plaintiffs have misconstrued the requirements of *Sandin*, and have consequently failed to state a due process claim. Without alleging a specific instance in which they were placed in segregation for an extreme and disproportionate time or with abhorrent conditions, for example, plaintiffs have failed to plead an atypical and significant hardship as required. Similarly, without alleging a specific instance in which they were deprived of good time credits, plaintiffs have failed to allege state action that would inevitably affect the duration of their sentences. Sandin requires the Court to focus on the result of a process, not on the process itself. The Court reaches the question of what process is due only after it decides that a liberty interest was created.

[14] Furthermore, the mere likelihood or potentiality of losing credits or placement in segregation is not enough

to state a claim under Sandin. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (establishing that plaintiff seeking injunctive relief premised upon an alleged past wrong must demonstrate a "real and immediate" threat of repeated future harm to satisfy the injury in fact prong of the standing test).

Plaintiffs', however, may be able to amend their complaint so as to plead a due process violation sufficiently. Plaintiffs' § 1983 due process claim is dismissed with leave to amend in order to substantiate the claim.

2. Equal Protection.

[15] "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). A plaintiff alleging denial of equal protection under § 1983 must prove purposeful discrimination by demonstrating that he "receiv[ed] different treatment from that received by others similarly situated," and that the treatment complained of was under color of state law. *Van Pool v. City and County of San Francisco*, 752 F.Supp. 915, 927 (N.D.Cal.1990) (citations omitted), *aff'd sub nom., O'Shea v. City and County of San Francisco*, 966 F.2d 503 (9th Cir.1992).

Courts have held that in order to present an equal protection claim a prisoner must allege that his treatment is invidiously discriminatory in comparison to that received by other inmates. *See More v. Farrier*, F.2d 269, 271-72 (8th Cir.) (absent evidence of invidious discrimination, federal courts should defer to judgment of prison officials), *cert. denied*, 114 S.Ct. 74 (1993).

[16] In this case, plaintiffs have satisfied their pleading burden as to their equal protection claims. First, plaintiffs allege that defendants, acted under color of state law. Second, plaintiffs allege numerous occasions in which they are treated differently than other prisoners. For instance, they are more likely to be punished than other prisoners because they do not understand prison rules and regulations. Plaintiffs also allege they are denied access to rehabilitation programs while no such restriction applies to non-disabled prisoners. Although plaintiffs will eventually have to prove such claims, their allegations are sufficient to survive a motion to dismiss. Furthermore, whether defendants, treatment of plaintiffs is invidiously discriminatory is a question of fact not appropriately addressed at this time.

B. Sixth Amendment.

[17] Plaintiffs apparently argue that their Sixth Amendment rights are violated because they are not given assistance to understand disciplinary hearings. Because prisoners do not generally enjoy a Sixth Amendment right to counsel in connection with disciplinary proceedings, however, plaintiffs, argument is subsumed by their due process claims. As described above, it is only after a court decides that a liberty interest has been created that a court will ask what process is due. The Sixth Amendment alone simply does not apply to post-conviction disciplinary proceedings.

C. Eighth Amendment.

[18, 19] A prisoner may state a 9 1983 claim under the Eighth Amendment against prison officials where the officials acted with "deliberate indifference" to the threat of serious harm or injury to an inmate by another prisoner. *See Farmer v. Brennan*, 114 S.Ct. 1970, (1994); *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir.1986). To prove deliberate indifference, a prisoner must show that

a prison official knew that the prisoner faced a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to abate it. *Farmer*, 114 S.Ct. at 1979, 1981. Neither negligence gross negligence, nor reckless disregard on the part of prison officials is sufficient to state a claim under § 1983. *Id.* at 1978 & n. 4; *see also Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (establishing that deliberate indifference requires more than negligence).

[20] Plaintiffs allege that prison officials knew that Clark and Woods, as disabled prisoners, were substantially more susceptible to physical and mental abuse, and took no reasonable steps to protect them, even depriving them of programs and activities that would have helped Clark and Woods avoid the alleged injuries. Plaintiffs' complaint sufficiently alleges a violation of the Eighth Amendment to state a § 1983 claim.

CONCLUSION

For the foregoing reasons, defendants, motion to dismiss plaintiffs, RA and ADA claims is DENIED. Defendants, motion to dismiss plaintiffs' § 1983 claim is DENIED as to plaintiffs, equal protection and Eighth Amendment claims. Defendants' motion to dismiss plaintiffs' § 1983 due process claim is GRANTED, but plaintiffs are granted leave to amend their complaint within 30 days as to their due process claim.

SO ORDERED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN ARMSTRONG, JAMES AMAURIC, RICHARD PONCIANO, JACK SWENSEN, BILLY BECK, JUDY FENDT, WALTER FRATUS, GREGORY SANDOVAL, DARLENE MADISON, PETER RICHARDSON, STEVEN HILL, and all others similarly situated, Plaintiffs, v. PETE WILSON, Governor of the State of California, JOSEPH SANDOVAL, Secretary of Youth and Corrections Agency, JAMES GOMEZ, Director of Corrections, KYLE S. MCKINSEY, Deputy Director for Health Care Services, KEVIN CARRUTH, Deputy of the Planning and Construction Division, DAVID TRISTAN, Deputy Director of the Institutions Division, MARISELA MONTES, Deputy Director of the Parole and Community Services Division, JAMES NIELSEN, Chairman of the Board of Prison Terms, Defendants.	No. C-94-2307 CW REMEDIAL ORDER, INJUNCTION, AND CERTIFICATION OF INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

The Court, having found the defendants have violated 42 U.S.C. § 12131 et seq. and § 504 of the Rehabilitation Act, hereby enters the following Remedial Order against defendants (except James Nielsen) pursuant to the Stipulation approved by the Court.

The Court finds that this Remedial Order is narrowly drawn, extends no further than necessary to correct the violation of the rights at issue and is the least intrusive means necessary to correct the violation of the rights.

A. Self-Evaluation, Transition Plan, Guidelines, Policies, and Procedures

1. Within 30 days of the date this Order is filed defendants shall submit the following to plaintiffs' counsel:

a. The California Department of Corrections' ("CDC") program, plan and procedures for implementation of its Disability Placement Plan ("DPP"). As a component of the DPP, CDC will cluster class members with certain disabilities at designated institutions and parole facilities. Plaintiffs do not object to the concentration of inmates and resources at particular institutions as long as such concentration is done in a manner consistent with the ADA.

b. A report of CDC's self-evaluation as required by 28 C.F.R. §35.105.

c. CDC's transition plan as required by 28 C.F.R. §35.150(d).

d. A general substantive outline setting forth the methods by which class members will be provided

accommodations, access to programs and effective communications at the designated institutions and non-designated institutions.

2. Defendants shall also submit guidelines, policies, procedures or plans regarding the following within 45 days from the date this Order is filed, provided that defendants shall submit any of these items as soon reasonably possible and as soon as they are completed:

a. Disability grievance procedures;

b. Reception Center processing times for inmates with disabilities;

c. Accommodations and structural features for inmates with disabilities in emergency situations, including yard incidents, fire drills, and evacuations;

d. Allowable assistive aids for inmates with disabilities in administrative segregation, security housing units and reception centers;

e. Accessibility features of new construction and alterations;

f. Criteria for determining whether inmates are totally medically disabled or medically unassigned; and

g. School and job assignments for prisoners with disabilities.

3. Within 30 days of receiving the submittal referenced in paragraphs 1 through 2 above, plaintiffs may serve written objections on defendants. Within 20 days of

the receipt of plaintiffs' objections, defendants' shall reposed in writing. Within 10 days of the defendants; response, the parties shall meet and confer and attempt to resolve any differences. If the conference fails to resolve the parties' differences, plaintiffs may file a notice within ten days requesting an evidentiary hearing. If the plaintiffs do not object to the submittal referenced in paragraphs 1 through 2 above, or any of them, the parties shall file a stipulation and proposed order in form substantially as that which is set forth in Appendix D.

4. Defendants shall submit guidelines, policies, procedures, plans or evaluations for all institutions that are consistent with any stipulated order under paragraph 3, above or litigated order under paragraph c, below by a date mutually agreed to by the parties, or, in the absence of an agreement, by a date set by the court.

5. Within 45 days of receiving the guidelines, policies, procedures, plans or evaluation referenced in paragraph 4 above, plaintiffs may serve written objections on defendants. Within 30 days of the receipt of plaintiffs' objections, defendants shall respond in writing. Within 15 days of the defendants' response, the parties shall meet and confer and attempt to resolve any differences. If the conference fails to resolve the parties' differences, plaintiffs may file a notice within ten days requesting an evidentiary hearing. If the plaintiffs do not object to the guidelines, policies, procedures, plans or evaluations references in paragraph 4 above, or any of them, the parties shall file a stipulation and proposed order in a form substantially as that which is set forth in Appendix D.

B. Discovery

Plaintiffs shall have a right to reasonable discovery after September 1, 1996, of facts that are relevant to proving whether defendants' guidelines, plans, policies,

procedures and evaluations comply with the ADA or § 504.

C. Standards for Judicial Review

At any hearing held pursuant to Section A above, the Court's review of defendants' self-evaluation, transition plan, disability placement plan and various specified guidelines, plans, policies and procedures shall be limited to determining whether they comply with the new Americans with Disabilities Act and § 504 of the Rehabilitation Act of 1973. If the Court finds that any aspect of the guidelines, plans, procedures or self-evaluations do not comply with the ADA or § 504 it may order defendants to make appropriate modifications to their guidelines, plans, policies, procedures or evaluations, provided that those order shall be limited to ensuring that the guidelines, plans, procedures or evaluations comply with the ADA and § 504 and are otherwise proper under existing law.

D. Monitoring

Plaintiffs shall be entitled to reasonable access to information sufficient to monitor defendants' compliance with the guidelines, plans, policies and procedures that have been approved by the Court. Such monitoring shall include access to relevant documents, receiving reports from defendants on subjects specified in § A of this order, tours of the institutions with and without their consultants and experts, interview or depositions in institution and departmental staff and scheduled interviews with inmates. Brief interviews with inmates amy be conducted during the tours, which may be conducted no more than every quarter at each institution or facility.

E. Enforcement

The Court shall retain jurisdiction to enforce the terms of this Order and any order approving the guidelines, policies, procedures, plans or evaluations set forth above.

If plaintiff's counsel have reason to believe that defendants are not complying with the terms of this Order or their guidelines, policies, procedures, plans or evaluations, they shall notify defendants. The parties shall attempt to resolve the issue informally before pursuing an judicial remedy.

Upon appropriate motion the Court may issue an order permitted by law, including contempt, necessary to ensure that defendants comply with the guidelines, policies, procedures, plans and evaluations set forth above.

F. Termination

Defendants may move the Court to vacate an order on the ground that they have substantially complied with its provisions and the guidelines, policies, procedures, plans and evaluations for a period of two years, provided that such motion may not be made earlier than one year after all the initial plans, policies, procedures and evaluations have been approved by the Court. This motion shall be filed pursuant to Rule 60(b)(5), of the Federal Rules of Civil Procedure or other applicable law.

G. Attorneys Fees

Plaintiffs are the prevailing party and are entitled to reasonable attorneys fees, litigation expenses and costs as provided by 42 U.S.C. § 12205 and 29 U.S.C. § 794a for work performed in this matter prior to the entry of this Remedial Order and Injunction. The amount of such fees, expenses and costs shall be decided upon duly

notices motion to the Court according to law. Except for the determination that plaintiffs are the prevailing party, defendants reserve any and all defenses to a fee award.

Plaintiffs shall be entitled to fees, litigation expenses and costs as authorizes by law to ensure compliance with this Order and subsequent remedial orders, including those implementing the guidelines, plans,procedures, policies and evaluations se forth above for the period until this Order is terminated as set forth in the previous subsection. The amount of such fees shall be determined according to law upon duly noticed motion. The parties shall negotiate an order for the periodic collection of attorneys fees and costs similar to that filed in Madrid V. Gomez, C-90-3094 TEH.

H. Certification of Interlocutory Appeal

After a review of the parties' stipulation, the Court hereby finds that the issue of whether the ADA and §504 of the Rehabilitation Act apply to the programs, services and activities provided by a state department of corrections to state prisoners and parolees is a controlling issue of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of this litigation within the meaning of 28 U.S.C. § 1292(b).

Dated: SEP 20 1996

/s/ Claudia Wilken
CLAUDIA WILKIN, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF CALIFORNIA

JOHN ARMSTRONG; JAMES AMAURIC; RICHARD PONCIANO; JACK SWENSEN; BILLY BECK; JUDY FENDT; WALTER FRATUS; GREGORY SANDOVAL; DARLENE MADISON; PETER RICHARDSON; STEVEN HILL; ROY ZATTIERO,

Plaintiffs,

v.

PETE WILSON; JOSEPH C. SANDOVAL; JAMES GOMEZ, Dir. Dept. of Corrections; KYLE McKINSEY; KEVIN CARRUTH; DAVID TRISTAN; MARISELA MONTES, Dept. Dir. of the Parole Division,

Defendants.

UNITED STATES OF AMERICA

Amicus Curiae

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C 94-02307 CW

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO REQUIRE DEFENDANTS TO MODIFY THEIR REMEDIAL PLANS (FIRST SET OF CONTESTED ISSUES)

Plaintiff moves for an order requiring Defendants to modify their remedial plans with respect to the first set of contested issues designated in the June 4, 1997 Scheduling Order. Defendants oppose the motion. The matter was heard on September 26, 1997. Having considered all of the papers filed by the parties and oral argument on the motion, the Court grants the motion in part, denies it in

part, and postpones deciding one issue until a later hearing.

BACKGROUND

Plaintiffs, 12 individuals representing a class of disabled prisoners and parolees, have brought claims against State officials involved in the California prison system for violations of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 1213134, and Section 504 of the Rehabilitation Act of 1973 (§ 504), 29 U.S.C. § 794.

On July 9, 1996, the Court approved a procedure for resolving the substantive issues in this case in lieu of trial. See Stipulation and Order for Procedures to Determine Liability and Remedy. All parties but James Nielsen had stipulated to this procedure as a result of settlement negotiations. (Hereinafter, "Defendants" will refer to all Defendants except Mr. Nielsen.) The stipulated procedure anticipated that Defendants would bring a motion for summary judgment based on the legal arguments that neither statute applied to State prisons and that Congress had not validly abrogated Defendants' Eleventh Amendment immunity to suit under the statutes. Defendants brought that motion, which the Court denied on September 20, 1996. The Court certified the legal issues in that motion for immediate appeal and the Ninth Circuit upheld the Court's decision on August 27, 1997. Armstrong v. Wilson, 97 Daily Journal D.A.R. 11143; see also Clark v. State of California, 97 Daily Journal D.A.R. 11140 (addressing Eleventh Amendment immunity issue in greater depth).

Defendants had agreed not to seek a stay of the case pending appeal, so the stipulated procedure went forward. On September 20, 1996, the Court adopted findings of fact and conclusions of law and entered a remedial order and injunction, all of which were defined in the stipulated

procedure of July, 1996. The Court found that Defendants violated the ADA and § 504 and ordered that they remedy the violations by developing, with advice from Plaintiffs, plans to provide class members with accommodations, program access and means of effective communication. The Court found that this remedial procedure "[was] narrowly drawn, extend[ed] no further than necessary to correct the violation of the rights at issue and [was] the least intrusive means necessary to correct the violation of rights."

Specifically, the Remedial Order required Defendants to submit several documents to Plaintiffs' counsel in the Fall of 1996: 1) the California Department of Corrections' (CDC's) program, plan and procedures for implementation of its Disability Placement-Plan (DPP), which all parties agreed would involve clustering class members with certain disabilities at designated institutions and parole facilities; 2) CDC's self-evaluation as required by ADA regulations 28 C.F.R. § 35.105; 3) CDC's transition plan as required by ADA regulations 28 C.F.R. §35.150(d); 4) a general outline setting forth the methods by which class members would be provided accommodations, program access, and effective means of communication; and 5) guidelines, policies, procedures or plans regarding seven specific areas of concern. These areas included a) disability grievance procedures, b) reception center processing times, c) accommodations and structural features for disabled inmates in emergency situations, d) allowable assistive aids for disabled inmates in administrative segregation, security housing units and reception centers, e) accessibility features of new construction and alterations, f) criteria for determining whether inmates are totally medically disabled or medically unassigned, and g) school and job assignments for disabled prisoners.

The Remedial Order instructed Plaintiffs to serve written objections on Defendants, to which Defendants

were to respond in writing. The Order then instructed the parties to meet and confer and attempt to resolve their differences. Plaintiffs had the right to request that the Court hold an evidentiary hearing in the event they were unable to reach resolution. At any such hearing, the Court would review Defendants' plans for compliance with the ADA and § 504 and order modifications to the plans if violations were found. If Plaintiffs did not object to Defendants' plans, the parties were instructed to file a stipulation and proposed order in a form substantially similar to one set forth as Appendix D to the July 9, 1996 Stipulation and Order. Once this process was completed, the Remedial Order directed that a similar process take place regarding plans for individual institutions within the prison system. The Order also addressed other issues not directly relevant here.

Plaintiffs filed objections to Defendants' plans on April 9, 1997. On June 4, 1997, the Court issued a Scheduling Order in accordance with a stipulation by the parties. The schedule divided the issues into four phases. First, the parties had until July 31, 1997[1] to propose the form of an order encompassing matters on which they were able to agree. Plaintiffs have submitted a Proposed Order and a supporting brief, and Defendants have submitted a Position on Entry or Form of Order Regarding Resolved Matters and a supporting brief. The following three phases of the schedule covered briefing and hearings on three sets of unresolved issues. This Order addresses the first set of contested issues, which includes 1) geographic distribution, 2) applicable legal standards, and 3) new construction and maintenance.[2]

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1. The original deadline was June 23, but by stipulation and order entered July 9, 1997, the deadline was extended to July 31.

2. According to the Scheduling Order, self-evaluation for Learning Disabled inmates was also included in this set of issues, but the issue was not addressed in the briefs and apparently is no longer in dispute.

DISCUSSION

I. Legal Standard

In order to determine the appropriate legal standards to apply in evaluating whether Defendants' plans comply with Title II of the ADA and with § 504, the Court must consult four sources: the two statutes, their implementing regulations, case law and agency guidance on the scope of a public entity's duty to accommodate disabled persons, and case law defining the appropriate limits of judicial interference in State prison administration.

A. The Statutes

Section 504 provides

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

29 U.S.C. § 794(a). The Act defines "program or activity" as

> all of the operations of (1)(A) a department, activity, special purpose district, or other instrumentality of a State or of a local government; or (B) the entity of such State or local government that distributes such assistance and each such department or agency . . . to which the assistance is extended, in the case of assistance to a State or local government; . . . any part of which is extended Federal financial assistance.

29 U.S.C. § 794 (b)(1)(a) and (b). The Court has found that some programs of the CDC receive federal financial

assistance as that term is used in Title 29 U.S.C. § 794. Therefore, § 504 applies to all of the operations of the CDC.

> Title II of the ADA provides that
> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.

42 U.S.C. § 12132. Any department, agency or other instrumentality of a State or local government is a "public entity" under the Act. 42 U.S.C. § 12131(1)(A) and (B). Thus, the ADA applies to the services, programs and activities of the CDC.

B. The Regulations

The regulations implementing Title II of the ADA largely adopt the language of the regulations implementing § 504 as it applies to recipients of federal assistance, although the ADA regulations provide more guidance. The following section describes the rules under both acts, unless otherwise specified. Regulations implementing Title II of the ADA are found at Part 35 of Title 28 of the Code of Federal Regulations. The regulations implementing § 504 with respect to entities receiving federal financial assistance are found at Part 41 of the same title.

1. General Duties

The regulations first describe the general obligations imposed by the statutes. A public entity may not deny disabled persons the opportunity to participate in or benefit from any aid, benefit or service, or afford an opportunity not equal to or not as effective as that enjoyed by nondisabled persons. 28 C.F.R. §

35.130(b)(1)(i)-(iii); 28 C.F.R. § 41.51(b)(i)-(iii). Public entities may not provide different or separate aids, benefits or services to disabled persons, unless necessary to make them as effective as those provided to others. 28 C.F.R.§ 35.130(b)(1)(iv); C.F.R. § 41.51(b)(iv). Nor may they "otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage or opportunity enjoyed by others in receiving the aid, benefit or service." 28 C.F.R.§ 35.130(b)(1)(vii); 28 C.F.R. § 41.51(b)(vii).

Public entities are required to make reasonable modifications in policies, practices or procedures if necessary to avoid discriminating on the basis of disability, "unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity." 28 C.F.R. § 35.130(b)(7).[3/] Public entities must also administer services, programs and activities in the most integrated setting appropriate to the

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3. Part 41 does not include a comparable clause; however, the Department of Justice has explained that this reflects the timing of when the regulations were promulgated rather than any substantive difference in legal standards. See 28 C.F.R. Part 39, Editorial Note ("Background"). The "fundamental alteration" language, as well as other language that refers to "undue financial and administrative burdens," reflects the holding of Southeastern Community College v. Davis, 442 U.S. 397 (1979), which limited the duty to accommodate disabled persons under § 504. When the Department of Justice promulgated the regulations implementing § 504 with respect to activities conducted by the Department (Part 39 of Title 28), it included language taken directly from Davis. See. e.g., 28 C.F.R. § 39.150(a)(2). These regulations in turn became the model for the ADA regulations. See further discussion in Section I.C, infra. In its commentary to the Part 39 regulations, republished as an "Editorial Note" in the Code of Federal Regulations, the Department explained that the Davis standard also applies to the Part 41 regulations, even though those regulations have not been revised to include the Davis language. 28 C.F.R. Part 39, Editorial Note ("Background").

needs of qualified individuals with disabilities. 28 C.F.R. § 35.130(b)(8)(c)-; 28 C.F.R. § 41.51(d).

2. Program Accessibility

Regulations specifically addressing "program accessibility" provide that disabled persons may not be excluded from participation in or be denied the benefits of the public entity's services, programs or activities or be subject to discrimination "because a public entity's facilities are inaccessible to or unusable by individuals with disabilities." 28 C.F.R. § 35.149; 28 C.F.R. § 41.56. The regulations then dictate different standards for existing facilities and for new construction or alterations.

With respect to existing facilities, the regulations require that public entities operate each service, program or activity so that, "when viewed in its entirety, [it] is readily accessible to and usable by individuals with disabilities." 28 C. F.R. § 35.150(a); 28 C.F.R. § 41.57(a). However, a public entity need not necessarily make each of its existing facilities accessible to or usable by disabled persons, 28 C.F.R. § 35.150(a)(1); 28 C.F.R. § 41.57(a), nor take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program or activity or undue financial and administrative burdens. 28 C.F.R. § 35.150(a)(3).[4] ADA regulations place on the public entity the burden of proving that compliance with section 35.150(a) would result in fundamental alterations or undue burdens. 28 C.F.R. § 35.150(a)(3). They require that the head of the entity or his or her designee make that decision "after considering all resources available for use in the funding and operation of the service, program, or activity" and explain the decision in a written statement. Id. Even if compliance would result in such alterations or burdens,

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4. See note 3, supra, and 28 C.F.R. ^U 39.150(a)(2).

the public entity must still take any other action that would not result in those alterations or burdens but would nevertheless ensure that disabled persons receive the benefits or services of the public entity. Id. No particular methods are required for compliance, but priority should be given to those methods that offer services, programs or benefits in the most integrated setting appropriate. 28 C.F.R. § 35.150(b)(1).

When new facilities or parts of facilities are built, they must be designed and constructed to be readily accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.151(a); 28 C.F.R. § 41.58. When a public entity alters a facility or part of a facility in a manner that could affect its usability, the public entity must, to the maximum extent feasible, do so in such manner that the altered portion is readily accessible to and usable by disabled persons. 28 C.F.R. § 35.151(b); 28 C.F.R. § 41.58. The ADA regulations provide that work that conforms with the Uniform Federal Accessibility Standards (UFAS) or the American with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) constitutes compliance, with exceptions not relevant here. 28 C.F.R. § 35.151(c). The regulations also permit substitution of methods described in these federal standards when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided. Id.

Some ADA regulations not included under "Program Accessibility" also affect decisions about a public entity's physical facilities. Public entities must "maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part," although "isolated or temporary interruptions in service or access due to maintenance or repairs" are permitted. 28 C.F.R. § 35.133. Furthermore, in determining the site or location of a facility, a public entity may not make selections that have the effect of excluding

disabled persons, denying them benefits, or otherwise discriminating against them, or that substantially impair the accomplishment of the service, program or activity with respect to disabled persons. 28 C.F.R. § 35.130(b)(4).

C. Case Law and Agency Guidance on Extent of Accommodation Duty

The scope of a public entity's duty to accommodate disabled persons under the ADA and § 04 is not well defined. In Southeastern Community College v. Davis, 442 U.S. 397 (1979), the U.S. Supreme Court held that §504 does not require accommodations that would result in a "fundamental alteration in the nature of a program." Id. at 410. Where accommodations do not impose "undue financial and administrative burdens," however, failure to make those accommodations might be discriminatory and thus violate the act. Id. at 412-13. In Davis, a deaf woman was denied admission to a nursing program because the school concluded that she could not safely participate in the normal clinical training program or safely care for patients, and that the program could not be modified without depriving the student of the benefits of the training. Id. at 401-02. Accommodating the student, the Court concluded, would have required fundamental alterations in the nature of the program. Id. at 409-10.

In Alexander v. Choate, the Court reaffirmed its holding in Davis, describing it as striking a "balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones." Alexander v. Choate, 469 U.S. 287, 300 (1985). See also Dempsey, by and through Dempsey v. Ladd, 840 F.2d 638, 641 (9th Cir. 1987) ("A state agency must be permitted to 'strike a balance'

between the particular interests of a handicapped person and a desire to defend the integrity of its programs.")(citing Alexander v. Choate).

The "fundamental alteration" language in these opinions defines the outer boundaries of what a public entity must do to comply with § 504: it need not take steps that fundamentally alter or substantially change the very nature of the program, service or activity offered. The test for whether proposed modifications would impose "undue financial or administrative burdens," however, is much murkier. See. e.g. Hovsons. Inc. v. Township of Brick, 89 F.3d 1096, 1104 (3rd Cir. 1996) ("We acknowledge that precisely what the 'reasonable accommodations' standard requires is not a model of clarity.")(applying § 504 standard to Federal Housing Amendments Act case). In non-employment contexts, the Ninth Circuit has advised only that "[t]he reasonable accommodation inquiry is highly fact-specific, requiring case-by-case determination." United States v. California Mobile Home Park Management Co., 29 F.3d 1413, 1418 (9th Cir. 1994) (applying § 504 standard to Federal Housing Amendments Act case).

In response to Davis and subsequent circuit court decisions,the Department of Justice revised the § 504 regulations applicable to activities conducted by the agency. These regulations include the current language that places the burden on the agency of proving a fundamental alteration or undue burden and requires the agency head to take responsibility for the decision, to consider all of the agency's resources, and to provide a written justification. See Section I.B.2, supra. The Department's "Editorial Note" on these regulations further explains that "because of the extensive resources and capabilities that could properly be drawn upon for section 504 purposes by a large Federal agency like the Department of Justice, the Department explicitly acknowledges that, in most cases, making a Department

program accessible will likely not result in undue burdens." 28 C.F.R. Part 39, Editorial Note (segment addressing § 39.150). Although the department's "entire budget is an inappropriate touchstone" for evaluating financial and administrative burdens, because many parts of the budget are earmarked for specific purposes, the Note observes again that "[t]here are extensive resources available to the Department and it is expected that the Department will, only on very rare occasions, be faced with 'undue burdens' in meeting the program accessibility or communications sections of the regulation."

The foregoing Note was published when the related regulations were adopted in September, 1984. When Congress passed the ADA in 1990, it specifically directed that ADA Title II regulations with respect to program accessibility and communications be consistent with Title 28, Part 39 of the Code of Federal Regulations. 42 U.S.C. § 12134(b). The regulations promulgated include the same language as that discussed in the Editorial Note to Part 39. See 28 C.F.R. §§ 35.150(a)(3), 35.164. The explanatory appendix to the ADA regulations, Title 28, Part 35, specifically refers to Part 39. 28 C.F.R. Part 35, Appendix A (segment relating to § 35.150). This appendix states that "the program access requirement of title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases." Id.

Because these regulations are consistent with Davis and have been implicitly endorsed by Congress, the Court will rely on them in determining whether Plaintiffs' proposed modifications would impose undue burdens on the CDC, subject to the appropriate level of deference to the needs of effective prison administration, discussed further in the next section.

D. Judicial Deference to State Prison Administration

The Ninth Circuit has held that the statutory rights applicable to the nation's general population must be applied to prisons with due deference to the needs of effective prison administration. Gates v. Rowland, 39 F.3d 1439, 1446 (9th Cir. 1994). Specifically addressing application of the ADA to prisons, the Circuit found "no indication that Congress intended the Act to apply to prison facilities irrespective of the considerations of the reasonable requirements of effective prison administration." Id. at 1447. Thus, in applying the ADA to prisons, the Ninth Circuit applied the standard of review prescribed by the Supreme Court in Turner v. Safley for prison policies that infringe inmates' constitutional rights: "the regulation is valid if it is reasonably related to legitimate penological interests." Id. (quoting Turner v. Safley, 482 U.S. 78, 89 (1987).

The Supreme Court identified four factors relevant to determining the reasonableness of prison policies, which the Ninth Circuit has summarized as follows:

> (1) whether there is a valid, rational connection between the prison policy and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right; (3) the impact that accommodation of the [] right will have on guards, on other inmates, or on the allocation of prison resources; and (4) whether the regulation or policy is an 'exaggerated response' to prison concerns. The burden is on the inmates to show that the challenged regulation is unreasonable under Turner.

Casey v. Lewis, 4 F.3d 1516, 1520 (9th Cir. 1993)(citations omitted). To satisfy the first factor, prison officials "need merely '"put forward"' a legitimate government interest" and provide some evidence that that interest is the actual

reason for the regulation. Casey, 4 F.3d at 1520-21 (quoting Turner, 482 U.S. at 89).

Defendants, relying on the reference to "allocation of prison resources" in the third factor, argue that the Court must apply the Turner standard to policies justified by the costs of accommodating disabled prisoners. The resources factor comes into consideration, however, only after Defendants have raised a legitimate penological justification for the CDC's policies. Because cost is a concern the CDC shares with all public entities, it does not qualify as a penological objective. Once Defendants have defended their policies based on a legitimate penological objective such as prison security, however, the Court must evaluate the reasonableness of that policy by considering the four factors summarized in Casey, including the costs of accommodation.

E. Summary

In reviewing the contested aspects of Defendants' remedial plan, therefore, the Court will first inquire into whether the plan fails to comply with the plain language of the statutes and their implementing regulations. To the extent Defendants raise an undue burden defence, the Court will be guided by the regulatory language placing the burden on Defendants to justify the defense and by the commentary accompanying the regulations, which sheds light on the threshold for when burdens become undue. If Defendants "put forward" legitimate penological justifications for aspects of their plans that violate the statutes, the Court will apply the four factor Turner test to determine whether Defendants' policies are reasonably related to those justifications.

II. Geographic Distribution

The CDC has selected ten prisons and three Community Correctional Reentry Centers (CCRC's) in the State to accommodate disabled prisoners and parolees. The CDC refers to these facilities as DPP facilities or designated facilities. Plaintiffs do not object to the clustering concept, but they argue that additional facilities should be included. Specifically, they argue that Defendants' choice of facilities violates the ADA and § 504 because it denies a significant percentage of disabled persons, solely on the basis of disability, the benefit of a State statutory requirement that they be incarcerated near their homes when reasonable. Defendants respond that 1) because the decision where to place prisoners and parolees is discretionary, disabled class members have not been denied any concrete benefit, and 2) because the choice of facilities was made after an "extraordinarily deliberate and conscientious" process in which the CDC weighed many factors, including costs, administrative burdens and legitimate penological objectives, the Court should defer to the agency's decision.

A. Violations of ADA or § 504 Provisions

State law requires the CDC to investigate for each newly committed prisoner "the existence of any strong community and family ties, the maintenance of which may aid in the person's rehabilitation" and "when reasonable" to "assign a prisoner to the institution of the appropriate security level and gender population nearest the prisoner's home, unless other classification factors make such a placement unreasonable." Cal. Penal Code § 5068. The statute defines "reasonable" as including consideration of "the availability of institutional programs and housing." Id.

In order to establish that the choice of designated prisons violates the ADA or § 504, Plaintiffs must show that disabled prisoners would be denied "the opportunity

to participate in or benefit from the aid, benefit or service" provided by the CDC, that this opportunity would not be equal to or as effective as the opportunities available to able-bodied prisoners, or that they would otherwise be limited "in the enjoyment of any right, privilege, advantage or opportunity enjoyed by others receiving the aid, benefit, or service." 28 C.F.R. § 35.150(b)(1)(i), (ii), (iii), (vii); 28 C.F.R. § 41.51(b)(1)(i), (ii), (iii), (vii). Obviously, this language is quite broad and encompasses more than the denial or abridgement of concrete rights. The statute requiring the CDC to place prisoners near their homes when reasonable constitutes at least a privilege or opportunity. Denying or diminishing this privilege or opportunity to prisoners by further restricting the available institutions in which they can be placed solely due to their disabilities, therefore, violates the cited provisions of the ADA and § 504.

Defendants argue that because the CDC also limits the possible assignments of other classes of prisoners, such as arsonists and sex offenders, the restrictions on assignments of disabled prisoners are not discriminatory. Plaintiffs correctly point out, however, that discrimination against classes not protected by federal antidiscrimination laws does not excuse discrimination against persons with disabilities, who are protected.

Defendants further argue that requiring them to amend their plan so that disabled prisoners are not denied the benefits of Penal Code section 5068 amounts to a federal court injunction requiring them to enforce State law, which is barred by the Eleventh Amendment. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 106 (1984). Pennhurst does not apply to this case. Plaintiffs have not asked the Court to order Defendants to enforce State law; they have challenged practices of Defendants that are allegedly discriminatory under federal law. Defendants cannot deny Plaintiffs the benefit of a State law solely on the basis of disability.

B. Undue Burden Defense

Defendants explain in some detail how they selected the DPP facilities. Most of the reasons cited fall into the category of financial and administrative burdens. These include concerns about the inmates' housing and service needs, costs, concentration of special resources, the age and physical structure of various institutions, institutional resources and expertise, availability of beds and program areas, and unique delivery systems. These factors must be evaluated under the regulatory standards for an affirmative undue burden defence. That is, the decision that accommodations would impose an undue burden must be made by the head of the agency or his or her designee, must be made considering all available resources, and must be justified in writing. The Justice Department's commentary on its regulations further implies that an agency the size of the CDC should be able to accommodate its disabled prisoners in all but the most unusual cases. The Court will analyze these in the context of each of Plaintiffs' proposed modifications.

As a preliminary note, however, the Court observes that all of Defendants' cost projections appear to be based on the need for structural modifications. Plaintiffs point out that accommodations for hearing- and vision-impaired prisoners and other disabled prisoners who do not need to use wheelchairs do not necessarily require structural modifications. To the extent that Defendants have failed to address the feasibility of adding facilities for non-wheelchair-bound disabled prisoners in the following categories so that they might be placed near their homes, they have failed to meet their burden of proving that Plaintiffs' proposed modifications would impose an undue burden.

1. Women in the South

Plaintiffs note that the only designated facilities for women are located in the central part of the State. Plaintiffs argue that the California Institution for Women (CIW), located in Southern California, which is the home region of two-thirds of women prisoners, also should be renovated. Plaintiffs observe that the CDC has already renovated the reception center at CIW, demonstrating that renovations are feasible regardless of the age of the facility. Plaintiffs also note that the California Institution for Men, another old facility, is being renovated. Arlene Solis, the CDC's Coordinator for Title II of the ADA, explained that CIW was rejected as a designated facility because the projected $2.8 million renovation cost was not justified by the system-wide need to house only 50 disabled women prisoners. The ADA and § 504 regulations require, however, that the head of the CDC or his or her designee decide, considering all of the available resources, whether renovating CIW would impose an undue financial burden on the prison system in light of the incremental value of adding this facility as a possible placement for disabled women from Southern California. It is not clear who made the decision not to designate the CIW to house disabled prisoners, whether that person was designated by the head of the CDC to make the decision, whether that person considered all available resources and prepared a written justification for his or her decision, and whether other actions could be taken to increase program accessibility. Therefore, Defendants have not established an affirmative undue burden defense with respect to facilities for disabled women.

2. Level II, III and IV Men in the South

Plaintiffs note that the only designated facility in Southern California, which is the home region of two-thirds of male prisoners, is a Level I facility. Plaintiffs propose that the CDC add California State Prison--Los

Angeles County (Lancaster), a Level III and IV facility, R.J. Donovan Correctional Facility (Donovan), a Level III facility, and California Correctional Institution at Tehachapi, a Level II facility, as designated facilities. Defendants state that because none of the facilities 5 in the South was built to be accessible, the costs of renovating them would be prohibitively high. Plaintiffs note that both Lancaster and Donovan were built while § 504 was in effect and should have been designed to be accessible. 28 C.F.R. § 41.58. Thus, they argue that Defendants should be estopped from raising an undue burden defense based on the cost of renovating those institutions.

Defendants have not met their burden of establishing an undue burden defense with respect to their duty to make these institutions accessible. They have not met the procedural requirements of the ADA regulations for this defence, which were reviewed in more detail in the previous section, and have failed to provide any specific information about the projected costs of renovating these institutions. Moreover, Defendants are out of compliance with § 504 at these institutions because they were not built to be accessible as required by the statute.

Defendants also claim that some Southern facilities cannot take inmates with heat sensitivities. They do not specify, however, which facilities these are, how many inmates have such sensitivities, or exactly what impact this has on the decision whether to increase the number of facilities designated as DPP facilities. Defendants also note that they occasionally override security level assignments so that Level II or III disabled inmates may be placed in Level I institutions. Without more information about whether and in what circumstances Defendants are committing to override disabled prisoners' security levels, however, the Court cannot conclude that this policy is sufficient to overcome the discriminatory effect of the CDC's choice of designated facilities.

3. Level II Men in the North.

Plaintiffs originally objected that the only designated Level II facility for male prisoners in Northern California, which is the home region of 14% of male prisoners, is the California Medical Facility (CMF), which ordinarily is restricted to prisoners with medical problems. At oral argument, however, Defendants confirmed that all wheelchair-bound Level II prisoners are eligible for placement at CMF, and Plaintiffs withdrew their objection.

4. Parolees in Region IV

Plaintiffs argue that the CDC should add a designated CCRC for parolees in Parole Region IV. Defendants respond that the number of parolees in that region is much smaller than in other regions, and that as CDC's contracts with these facilities come up for renewal, contractual language will be modified to provide appropriate accommodations for disabled parolees. Again, Defendants have not met their burden of demonstrating that immediate renovations in these facilities would be an undue burden. Defendants must follow the procedures outlined in the ADA regulations. Any written justification for the policy should provide more specific information regarding the expiration date of contracts for Region IV facilities and the anticipated date that accommodations would be provided.

C. Legitimate Penological Objectives

Defendants also defend their choices with two penological justifications, which they assert were primary factors in determining which facilities to designate.[5]

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5. Defendants also cite "community resources" as a reason for their choice of facilities, which could be a penological justification if Defendants' intent was to cluster disabled persons in communities that offer unique resources that would aid in rehabilitation. Plaintiffs'

These were the need to accommodate the existing classification system, and safety and security concerns. The only explanation offered as to how the CDC's choice of facilities advances these interests, however, is Ms. Solis' explanation that the prison system needs flexibility to respond to "population pressures." Ms. Solis explains the importance of maintaining the classification system, which segregates prisoners of different security risks and houses prisoners in facilities designed for their particular security risk. She persuasively describes the prison system's need to be able quickly to convert housing units from one classification to another as the number of prisoners at various levels of security risk rises and falls. The Court does not doubt that this ability is critical to administering a prison system. By increasing the number of possible placements for disabled prisoners, however, Plaintiffs' proposed modifications would seem to enhance the CDC's flexibility. Ms. Solis herself describes a situation in which the availability of accessible units at an institution that was not intended to house disabled prisoners gave the CDC the flexibility it needed to accommodate an increase in the number of level III disabled prisoners. See Solis Dec. at ¶ 20.

In the context of their defense of the CDC's two-percent scoping policy,[6] Defendants argue that an excess of accessible housing units in the system raises security threats. This might be a legitimate penological

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argument, however, is that the CDC's choice of facilities blocks inmates' access to community resources, specifically contact with family and community members in their home regions, which the California Legislature has found aids in rehabilitation. See 1989 Cal. Stat. c.1061 § 1. Therefore, the record as it currently stands does not demonstrate a reasonable relationship between Defendants' choice of facilities and the penological objective of rehabilitation.

6. "Scoping" refers to the percentage of cells in newly-constructed prisons that will be built to be structurally accessible. See Section IV.A, infra.

objective justifying denying some disabled prisoners the opportunity to be placed near their homes, as provided in Turner.[7] Defendants, however, have not asserted that the choice of facilities was shaped by a desire to limit the overall number of accessible cells. Nor have they adequately explained how Plaintiffs' proposed modifications would prevent the CDC from balancing its need for flexibility with its need to limit the number of excess accessible cells in the system.

III. Legal Standards

Plaintiffs raise a series of objections to language in the CDC's Administrative Bulletin implementing the Department's Disability Placement Program.[8] Plaintiffs argue that it is critical that the language in this bulletin accurately reflect the legal obligations of the prison system, because both prison staff and inmates will rely on the bulletin to understand their duties and rights. Defendants argue that some of Plaintiffs' objections are unjustified and founded on mistrust, and others are based on a misunderstanding of appropriate legal standards.

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7. If Defendants choose to make this argument, the Court must also determine whether a policy of limiting the number of accessible cells is reasonably connected to Defendants' asserted security interests. The Court does not reach that question in this Order.

8. The parties also addressed communications standards in the bulletin, but Plaintiffs later requested that this issue be consolidated with other issues affecting hearing-impaired prisoners that will be briefed and argued in the third set of contested issues. Defendants responded to two objections that Plaintiffs had not raised in their motion. See Def. Br. at 21-22. At oral argument, Plaintiffs indicated that they were expecting these issues to be resolved in the final version of the Administrative Bulletin, and were reserving their objections until this was confirmed. The Court, therefore, has not addressed these issues.

Defendants further object that Plaintiffs' objections are overly intrusive. They emphasize that they have shown good faith in complying with the Remedial Order and have undertaken costly reforms to accommodate disabled prisoners. They argue that Plaintiffs' objections "wrongfully attempt to impede on a discretionary methods of statutory implementation, and involve concerns that are picayune and cannot reasonably be considered to be mandated by the statutes." Def. Br. at 22. Plaintiffs respond that they do not seek a court order dictating specific language. Rather, they seek an order that would require Defendants to modify their plans to comply with federal law, but would allow Defendants to draft the revisions.

The Court's Remedial Order, to which the parties stipulated, anticipated that Plaintiffs would present objections to Defendants' plans to the Court, that the Court would determine whether the plans comply with federal law, and that if the Court determined that they did not comply it would order Defendants to modify their plans. Defendants agreed that this remedy was the least intrusive means necessary to correct the violations of Plaintiffs' rights. For a bulletin to "comply," it must accurately state the CDC's duties and prisoners' rights under the law. Thus, Plaintiffs' objections and this Court's review of the language of the bulletin do not unduly interfere with the prison system's efforts to remedy its established violations of federal law.

A. Statement of Affirmative Duties under the ADA and § 504

Plaintiffs argue that the bulletin does not sufficiently explain that the CDC has an affirmative obligation under the statutes to accommodate disabled prisoners. Plaintiffs cite only one example of unacceptable language, however, in the section describing Inmate Programs, on page 22 of the bulletin.

The bulletin essentially states that not all inmate programs must be modified to be made accessible; however, a program may be left inaccessible only if one of four criteria is met: safety or security risk, fundamental alteration, undue burden, or disabled persons' inability to perform the essential functions of the program. Plaintiffs want the language revised to state that the CDC must modify all programs to make them accessible unless one of those same four criteria is met. Under either phrasing, the CDC's duties and prisoners' rights are the same. While Plaintiffs' phrasing may more accurately reflect the spirit of the ADA, the Court will not order Defendants to modify the language.

B. Undue Burden Standard

Plaintiffs specifically argue that the undue burden is not properly defined in the Inmate Programs section. The Court agrees that the bulletin does not accurately describe the defense or the steps the CDC would have to take to establish the defence. Nor does the bulletin explain that even if an undue burden is shown, the CDC must still take any other action that would not result in a fundamental alteration of the program or an undue burden but that would nevertheless ensure that disabled inmates receive the benefits or services of the program. See. e.g. 28 C.F.R.§ 35.150(a)(3). The bulletin should be revised to explain accurately the undue burden defense in accordance with the Court's discussion in Sections I.B and I.C, supra.

C. Lack of Reference to Maintenance Requirement

Plaintiffs note that the Administrative Bulletin does not specifically address Defendants' duty to maintain in operable working condition the structural features and equipment necessary to accommodate disabled prisoners. See. e.g. 28 C.F.R. § 35.133. Defendants state that maintenance need not be addressed in the bulletin,

because the CDC already has adequate maintenance systems in place. The Remedial Order, however, requires that Defendants submit to Plaintiffs the CDC's plan and procedures for implementing its Disability Placement Plan and a general substantive outline of the methods by which class members will be provided accommodations and program access. If the first does not comprise plans for maintaining accessibility features, the second certainly does. If Defendants plan to rely on their standard maintenance procedures, they should provide these to Plaintiffs for their review. Furthermore, because the bulletin "complies" with the ADA and § 504 only if it accurately describes the CDC's duties under these acts, the bulletin must be revised to describe the maintenance obligation as well.

IV. New Construction and Alteration Policy

The Court's Remedial Order required Defendants to submit their guidelines, policies, procedures and plans regarding accessibility features of new construction and alterations of existing buildings. Defendants submitted a two-paragraph letter. Plaintiffs object that this letter does not ensure compliance with the ADA and § 504, and specifically target three deficiencies.

A. Scoping

Scoping refers to the proportion of housing units designed and built to be structurally accessible in new prison construction. Defendants' letter states that approximately two percent of bed capacity designed for new prisons will be accessible, and these units will be dispersed among housing units and aligned program 17 areas. Defendants state that the CDC will decide on a case-by-case basis if a new prison is to be a designated facility for disabled persons, and if so whether the two percent designed bed capacity will be sufficient and how it will be dispersed. Defendants add that the CDC will,

where appropriate, cluster accessible housing program areas within specified facilities. Plaintiffs note that two percent scoping falls short of federal guidelines for new institutional construction.

ADA and § 504 regulations require that new facilities be designed and constructed in such manner that they be readily accessible to and usable by persons with disabilities. 28 C.F.R. § 35.151(a); 28 C.F.R. 41.58(a). The regulations provide that new construction that conforms with one of two sets of federal guidelines, the Uniform Federal Accessibility Standards (UFAS), 41 C.F.R. Part 101-19.6, Appendix A, or the ADA Accessibility Guidelines (ADAAG), 28 C.F.R. Part 36, Appendix A, "shall be deemed to comply" with ADA regulations. Plaintiffs argue that Defendants must comply with one of these standards, and note that the UFAS require five percent scoping and an ADAAG final interim rule applicable to State prisons requires three percent.[9]

The regulation, however, states only that conforming with these standards is one method of complying with the fundamental requirement that newly built facilities be accessible, not that this is the only method. Even if conforming with the standards were required, the regulations explicitly permit substitution of other methods when it is evident that equivalent access is provided. The touchstone of compliance, therefore, is the degree of access afforded in the new facilities.

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9. Furthermore, Plaintiffs note that these scoping guidelines refer to actual capacity. Defendants have stated that the CDC's two-percent policy is based on designed bed capacity, and will result in one-percent scoping in overcrowded conditions. Plaintiffs noted at oral argument that the prison system is currently at 200 percent of its designed capacity.

The federal standards demonstrate that, for a newly constructed building to be accessible, it is not necessary that every room in the building be structurally accessible. Rather, the building must be sufficiently accessible that disabled persons have access to the programs and services of the public entity operating the facility that is equal to, as effective as, and integrated with the access enjoyed by able-bodied persons. See Section I.B, supra.

Defendants explain that their two-percent scoping policy is designed to "limit the number of accessible placements in prisons to reflect the actual number of inmates who need them." Solis Dec. ¶ 48. That is, they want to provide a sufficient number of accessible units for disabled prisoners, but no more.[10] Plaintiffs raise no apparent objection to a plan that provides just enough units to meet the prisons' needs, but question the CDC's population projections on which the two-percent figure is based. This issue, however, is scheduled to be briefed in the second set of contested issues. Absent accurate population projections based specifically on the California prison population, the only available guidelines for determining whether Defendants' new construction scoping plans comply with the ADA and § 504 are the federal standards. Therefore, unless Defendants can justify their projections in the next round of briefing, their plan for new construction is out of compliance with federal law.

Defendants claim that they are exceeding the ADA's requirements regarding program access in existing facilities, and that this should offset their accessibility obligations with respect to new construction. Nothing in the ADA permits such an offset. Defendants further argue

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10. Based on Defendants' explanations for why the CDC does not want excess units, the Court deduces that they are referring only to units made structurally accessible for wheelchairs. Apparently, Plaintiffs' objections also only address the need for wheelchair accessible housing units.

that forcing the CDC to comply with federal accessibility standards would violate the federalism principles established in Printz v. United States, 1997 U.S. LEXIS 2 4044. Printz, however, established that the federal government cannot require State officers to carry out a federal regulatory program. Here, Defendants are merely being required to comply with federal law.

Finally, Defendants assert financial and penological justifications for "limit[ing] the number of accessible placements in prisons to reflect the actual number of inmates who need them." See Solis Dec. ¶ 48. Because such a policy would not violate the ADA or § 504, however, it is not necessary to evaluate these asserted defenses. The question that still must be resolved is simply whether a two-percent scoping policy will in fact meet the disabled prison population's needs.

B. Aligned Program Areas

Defendants have stated in their letter describing their new construction policy that inmate accessibility will be provided in housing units and aligned program areas. At oral argument, Defendants explained that "aligned program areas" refers to all program areas that would be available to able-bodied prisoners living in the area of the prison where the structurally accessible housing units are located. Plaintiffs indicated that with this understanding they would withdraw their objection. Defendants should revise their new construction and alteration policy to reflect this definition of the term.

C. Alterations in Existing Facilities

Defendants state that pursuant to State law the altered area of the building will comply with accessibility requirements. Plaintiffs argue, however, that alterations must comply with federal standards, and that access must be provided in paths of travel, restrooms and at least one

entrance to the altered area if the added cost is not disproportionate to the cost of the project. Defendants did not specifically respond to this objection.

ADA and § 504 regulations require that alterations be designed "to the maximum extent feasible" to be readily accessible to and usable by disabled persons. Defendants' plan commits the CDC only to complying with accessibility codes regarding the specific alteration, and states only that projected construction at designated facilities will be reviewed at the design phase, without committing to enhancing accessibility. Therefore, Defendants' plans regarding alterations of existing facilities do not comply with the ADA or § 504.

CONCLUSION

For the foregoing reasons, Plaintiff's motion is granted in part and denied in part.

Plaintiffs have shown that Defendants' choice of DPP facilities violates the ADA and § 504 by denying certain groups of disabled prisoners the opportunity to be incarcerated near their homes solely on the basis of disability. Defendants have not raised an adequate undue burden defense or justified their noncompliance by articulating legitimate penological objectives reasonably related to their policies. The Court will accept further briefing on these issues if Defendants wish to assert these defenses according to the legal standards outlined in this Order.

Defendants must modify the Inmate Programs section of the Administrative Bulletin to state accurately the requirements for asserting an undue burden defense and to state that even if requested accommodations would impose an undue burden or would fundamentally alter a program, the CDC must take other action that would not have those effects but would still enhance the program's

accessibility. Defendants must also provide information about its maintenance programs to Plaintiffs, which Plaintiffs may review and criticize pursuant to the procedures outlined in the Remedial Order, and must revise the Administrative Bulletin to state the CDC's duties to maintain accessibility features.

Unless Defendants can justify their population projections when briefing the second set of contested issues, CDC's two-percent scoping policy will be found out of compliance with the ADA and § 504. Defendants' description of its plans for making program areas in new construction accessible and for making accessibility modifications while altering existing facilities likewise do not comply with these statutes. Defendants must submit revised plans for new construction and alterations to Plaintiffs, which will then be reviewed under the procedures outlined in the Remedial Order.

Dated: Oct-8, 1997

/s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

Title 42, United States Code

SUBCHAPTER II - PUBLIC SERVICES

PART A - PROHIBITION AGAINST DISCRIMINATION AND OTHER GENERALLY APPLICABLE PROVISIONS

§ 12131. Definitions

(1) Public entity

The term "public entity" means:
(A) any State or local government;
(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§ 12132. Discrimination.

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities

of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

§ 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

Title 29, United States Code

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of -

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is

extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship -

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be

construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 *et seq.*) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.